A HISTORY OF ENGLISH LAW

BY

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VOLUME VII

To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.

ROGER NORTH

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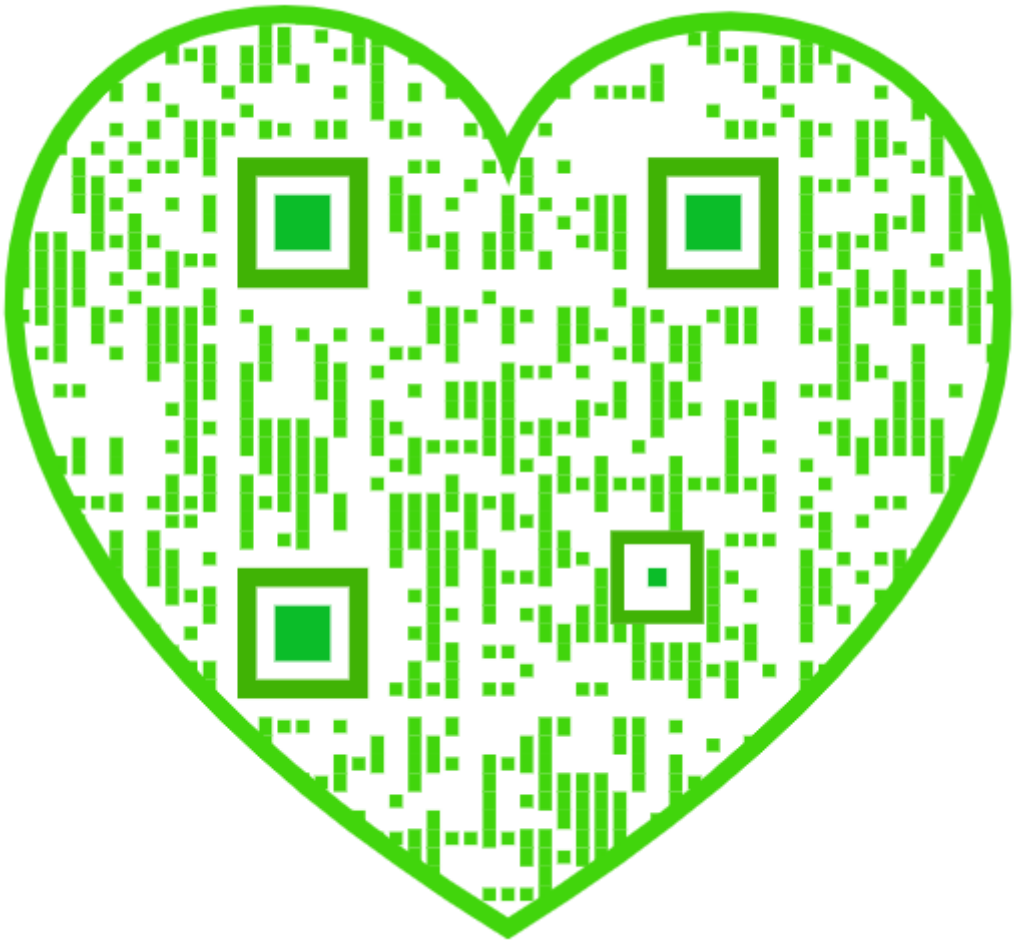

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PREFACE

THE Preface to these two volumes must begin with a plea of confession and avoidance. I have to confess that volume seven is not the last volume. In deals only with the history of the law of property—real property, chattels real, and chattels personal. I have found it necessary to put the history of the law of obligations, contractual and delictual, of mercantile law, and of criminal law into an eighth volume; and to leave the history of the law of status, and of evidence, procedure and pleading, to a ninth volume. But, as an explanation of this alteration of my original plan, I must point out that the history of many of the subjects treated of in these volumes is taken down to the nineteenth century, so that their history is finally concluded. The history of the land law, of the action of trover and conversion, of the ownership and possession of chattels, of the doctrine of consideration, of much of the criminal law and the law of tort, and of procedure and pleading, is thus finished. The parts of legal doctrine which are not finished, because their development belongs essentially to the eighteenth and nineteenth centuries, are mercantile and maritime law, some parts of the law of contract and tort, the law of evidence, equity, international law, and ecclesiastical law. These topics I shall hope to deal with if I am able to write the history of these centuries. But, whether or not I am able to accomplish this, I think that I may claim that in these nine volumes there is contained a large instalment of a complete history of English law. That it might have been better written I am fully conscious; but, at any rate, it is better than no

history at all; and it will, I hope, afford some sort of a starting point for the labours of my successors. If it helps towards a better understanding of English history in general; and, above all, if it helps towards the establishment of the truth that programmes of legal studies, in which legal history is either excluded or given a subordinate place, show a wholly imperfect understanding of the aims and methods of the academic study of the law—it will not have been written in vain.

I have again to thank the Directors of the Commonwealth Fund of the United States for a contribution which has enabled me to include in this volume the extra pages needed to obtain completeness of treatment. I have also to thank Dr. Hazel, All Souls Reader in English Law in the University of Oxford, and Reader in Constitutional Law and Legal History in the Inns of Court, for the benefit of his criticism, and his help in correcting the proof sheets; and Mr. Costin, Fellow and Lecturer in History at St. John's College, Oxford, for making the list of statutes.

ALL SOULS COLLEGE
July, 1925

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(VOL. II.) BOOK II. (449-1066)—ANGLO-SAXON ANTIQUITIES: Introduction. Part I. Sources and General Development. Part II. The Rules of Law: § 1 The Ranks of the People; § 2 Criminal Law; § 3 The Law of Property; § 4 Family Law; § 5 Self-help; § 6 Procedure.

BOOK III. (1066-1485)—THE MEDIÆVAL COMMON LAW: Introduction. Part I. Sources and General Development: CHAP. I. The Intellectual, Political, and Legal Ideas of the Middle Ages. CHAP. II. The Norman Conquest to Magna Carta. CHAP. III. The Reign of Henry III. CHAP. IV. The Reign of Edward I. CHAP. V. The Fourteenth and Fifteenth Centuries. (VOL. III.) Part II. The Rules of Law: CHAP. I. The Land Law: § 1 The Real Actions; § 2 Free Tenure, Unfree Tenure, and Chattels Real; § 3 The Free Tenures and Their Incidents; § 4 The Power of Alienation; § 5 Seisin: § 6 Estates; § 7 Incorporeal Things; § 8 Inheritance; § 9 Curtsey and Dower; § 10 Unfree Tenure; § 11 The Term of Years; § 12 The Modes and Forms of Conveyance; § 13 Special Customs. CHAP. II. Crime and Tort: § 1 Self-help; § 2 Treason; § 3 Benefit of Clergy, and Sanctuary and Abjuration; § 4 Principal and Accessory; § 5 Offences Against the Person; § 6 Possession and Ownership of Chattels; § 7 Wrongs to Property; § 8 The Principles of Liability; § 9 Lines of Future Development. CHAP. III. Contract and Quasi-Contract. CHAP. IV. Status: § 1 The King; § 2 The Incorporate Person; § 3 The Villeins; § 4 The Infant; § 5 The Married Woman. CHAP. V. Succession to Chattels: § 1 The Last Will; § 2 Restrictions on Testation and Intestate Succession; § 3 The Representation of the Deceased. CHAP. VI. Procedure and Pleading: § 1 The Criminal Law; § 2 The Civil Law.

(VOL. IV.) BOOK IV. (1485-1700)—THE COMMON LAW AND ITS RIVALS: Introduction. Part I. Sources and General Development: CHAP. I. The Sixteenth Century at Home and Abroad. CHAP. II. English Law in the Sixteenth and Early Seventeenth Centuries: The Enacted Law. (VOL. V.) CHAP. III. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—International, Maritime, and Commercial Law. CHAP. IV. English Law in the Sixteenth and Early Seventeenth Centuries: Developments Outside the Sphere of the Common Law—Law Administered by the Star Chamber and the Chancery. CHAP. V. English Law in the Sixteenth and Early Seventeenth Centuries: The Development of the Common Law. (VOL. VI.) CHAP. VI. The Public Law of the Seventeenth Century. CHAP. VII. The Latter Half of the Seventeenth Century: The Enacted Law. CHAP. VIII. The Latter Half of the Seventeenth Century: The Professional Development of the Law.

(VOL. VII.) Part II. The Rules of Law. CHAP. I. The Land Law: § 1 The Action of Ejectment; § 2 Seisin Possession and Ownership; § 3 Contingent Remainders; § 4 Executory Interests; § 5 Powers of Appointment; § 6 The Rules Against Perpetuities; § 7 Landlord and Tenant; § 8 Copyholds; § 9 Incorporeal Things; § 10 Conveyancing; § 11 The Interpretation of Conveyances. CHAP. II. Chattels Personal: § 1 The Action of Trover and Conversion; § 2 The Ownership and Possession of Chattels; § 3 Choses in Action. (VOL. VIII.) CHAP. III. Contract and Quasi-Contract: § 1 The Doctrine of Consideration; § 2 The Invalidity, the Enforcement, and the Discharge of Contract; § 3 Quasi-Contract. CHAP. IV. The Law Merchant. I.—Commercial Law: § 1 Usury and the Usury Laws; § 2 Negotiable Instruments; § 3 Banking; § 4 Commercial Societies; § 5 Agency; § 6 Bankruptcy. II.—Maritime Law. III.—Insurance. CHAP. V. Crime and Tort. Lines of Development. § 1 Constructive Treason and Other Cognate Offences; § 2 Defamation; § 3 Conspiracy, Malicious Prosecution, and Maintenance; § 4 Legal Doctrines Resulting from Laws Against Religious Nonconformity; § 5 Lines of Future Development; § 6 The Principles of Liability. (VOL. IX.) CHAP. VI. Status: § 1 The King and Remedies Against the Crown; § 2 The Incorporate Person; § 3 British Subjects and Aliens. CHAP. VII. Evidence, Procedure, and Pleading: § 1 Evidence; § 2 Common Law Procedure; § 3 Equity Procedure.

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BOOK IV (*Continued*)

(1485-1700)

THE COMMON LAW AND ITS RIVALS

A HISTORY OF ENGLISH LAW

PART II

THE RULES OF LAW

CHAPTER I

THE LAND LAW

IN Part I. of this Book I have described the modifications in the land law effected by the introduction of uses and wills,[1] and by the statutes which regulated both these and other parts of this branch of the law.[2] I have also given a short account of the main lines of its general development during this period.[3] In this, as in the preceding period, by far the most important contribution to the principles of the land law was made by the judges. By the manner in which they interpreted the statutes, developed old principles, and devised new principles to meet altered conditions and new needs, they built up our modern land law upon its mediæval foundations. It is the process of the construction of our modern land law upon its mediæval foundations which is the subject of this chapter.

In the first place I shall describe the rise of the action of ejectment, and the manner in which it superseded almost entirely the real actions. This change in procedure had very important effects upon the development of the law relating to ownership and possession; and with the developments in this branch of the law, due to this and other causes, I shall deal in the second place. Some of these developments are connected with the very much larger powers, which the landowners had gained during this period, of controlling the fate of their property, by the creation of many different kinds of future estates in the land. I shall therefore go on to describe the nature of these future estates, and the development of the law relating to them. I shall then pass to the closely connected topic of the growth of the various devices invented by the courts to prevent landowners from using their

[1] Vol. iv 407-480. [2] Ibid 461-467, 480-488; vol. vi 397-398.
[3] Vol. iv 473-476; vol. v 415-416; vol. vi 627-628.

large powers of controlling the fate of their property for the purpose of destroying those powers; and the manner in which, at the end of this period, the modern rule against perpetuities was evolved. In the following three sections I shall describe the manner in which the law of landlord and tenant, the law as to copyholds, and the law as to various kinds of incorporeal things, were developed by the courts, and put substantially upon their modern basis. Having thus dealt with the main developments in the principles of the law, I shall say something of the great developments in conveyancing to which these changes had given rise. Lastly, I shall say something of the growth of the rules of construction which the courts applied to interpret these conveyances.

My arrangement of this chapter will therefore be as follows: —§ 1. The Action of Ejectment; § 2. Seisin, Possession, and Ownership; § 3. Contingent Remainders; § 4. Executory Interests; § 5. Powers of Appointment; § 6. The Rules against Perpetuities; § 7. Landlord and Tenant; § 8. Copy-holds; § 9. Incorporeal Things; § 10. Conveyancing; § 11. The Interpretation of Conveyances.

§ 1. The Action of Ejectment

We have seen that the action of ejectment was a form of the action of trespass, which was used to protect the tenant for a term of years; that at first only damages could be recovered in this action; but that in the year 1499 it was finally settled, in accordance with dicta of 1468 and 1482, that the term itself could be recovered.[1] The action had thus come to possess the leading characteristic of the real actions; and, in the course of the sixteenth and the following centuries, its machinery and incidents were so skilfully adapted to the performance of the functions of those real actions, that it almost entirely superseded them. I shall relate the history of this process under the following heads: —The Real Actions and the Action of Ejectment; the Adaptation of the Action of Ejectment; the Limitations upon the Sphere of the Action of Ejectment.

The Real Actions and the Action of Ejectment

We have seen that during the Middle Ages the real actions, and the learning which centred round them, were the fullest and the most important part of the common law; and that, though the action of trespass and its offshoots had begun to make some small inroads upon certain of these actions, there was a reluctance,

[1] Vol. iii 214-217.

which did not disappear till the close of the sixteenth century, to allow litigants to use one of the offshoots of trespass when they might have brought a real action.[1] But these real actions possessed very grave defects, from many of which the action of ejectment and other forms of the action of trespass were free. Therefore, when it became possible to recover the land itself by the action of ejectment, litigants turned to it with relief, and, whenever possible, ceased to make use of the real actions. We shall find an abundant explanation of this phenomenon if we look at some of the characteristic defects of the real actions, and compare the comparative freedom of the action of ejectment from these defects.

In the first place, we have seen that mesne process in the real actions was so lengthy and tedious that it often amounted to a total denial of justice.[2] In the second place, these actions were very numerous, and often very limited in their scope.[3] "Some were to be brought in a particular court; some lay only between particular persons; others for and against those who had only particular estates, with various other circumstances that were requisite antecedents to the bringing of an action."[4] Obviously these characteristics increased the danger of choosing the wrong form of action. In the third place, this narrowness in their scope tended to aggravate the tendency to require a minute verbal accuracy in the wording of the writ and the pleadings. Some of the rules on this topic were almost inconceivably technical. Thus, the subject matter of the claim, if it consisted of various things—such as a house, a manor, meadow, pasture, and so forth—must not only be particularly described, they must be demanded in the right order.[5] Further, they must be described by their proper technical names. Just as in the old Roman law, a man who sued another for cutting his vines, lost his action if he did not call the vines trees,[6] so at common law, a man who brought a real action for a house or an orchard lost his action if he did not call the house a messuage, and the orchard a garden.[7] Similarly, the rules of pleading, which differed in different classes of real actions, were very precise, and

[1] Vol. iii 27-28; cp. Maitland, Forms of Action 351-352.
[2] Vol. iii 624-625. [3] Ibid 6, 15-26. [4] Reeves, H.E.L. iii 181.
[5] Booth, Real Actions 2; cf. Y.B. 7 Hy. VI. Pasch. pl. 43 (p. 37).
[6] Gaius iv § 11, "Ideo immutabiles proinde atque leges observabantur unde eum, qui de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, cum debuissent arbores nominare, eo quod lex xii tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur."
[7] "An ejectione firm. was brought de pomario, and well, for it need not be demanded by the name of a garden, as a precipe ought to be. For an ejectione firm. lies de domo, but the precipe shall be pro mess," Wright v. Wheatley (1600) Noy 37; for a similar statement see Royston v. Eccleston (1623) Cro. Jac. 654.

allowed hardly any liberty of amendment. Unless the plaintiff's title and estate was set out with absolute accuracy, he lost his action.[1] The parties, as Lord Mansfield truly said, were constantly liable to be entangled by the nicety of the pleadings on either side.[2]

In fact, the real actions preserved the characteristics, and combined the defects, of many different periods in the history of common law procedure. Firstly, the extraordinary verbal accuracy required in writ and count, and the limited scope of each of these actions, take us back to the most primitive period in the history of the common law, and embody characteristics of the procedure of a period before the common law itself.[3] Secondly, even in the seventeenth century they retained traces of the period when, all pleadings being oral, a greater latitude of amendment was sometimes admitted.[4] But this latitude had early ceased to benefit materially the parties to the real actions. Hale has noted[5] that, after the time of Edward III., "the pleaders, yea and the judges too, became too curious therein. So that that art, or dexterity of pleading, which in its use nature and design was only to render the fact plain and intelligible, and to bring the matter to judgment with convenient certainty, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become a piece or nicety and curiosity." The evil effects of this tendency became even more apparent in the sixteenth and seventeenth centuries, when written pleadings, drawn up in their final form out of court, succeeded the oral discussion in court.[6] Far less liberty of amendment was possible under the newer than under the older system.[7] No doubt this change affected the pleading in all classes of action; but it affected the real actions most of all, partly because they were far less general in their scope, and partly because they had accumulated around them a mass of technical

[1] "The rules of pleading were so severe that the action abated if the same thing was twice demanded in the writ; or if by mistake too many demandants had been joined; or if the tenant pleaded non-tenure where the demandant claimed more land than the tenant was possessed of; or if the demandant had by mistake declared on the seisin of his father instead of his grand-father," Sedgwick and Wait, Ejectment, Essays A.A.L.H. iii 613-614; cp. Booth, Real Actions 2, 3.

[2] Below 7 n. 9.

[3] Vol. ii 105-106; vol. iii 617-618.

[4] Below n. 7.

[5] History of the Common Law (6th ed.) 212.

[6] Vol. iii 655; vol. iv 535-536; vol. v 419; vol. vi 570-571, 633.

[7] "When causes, which they call real, come on and require counting and pleading at the bar, it is done for form and unintelligibly; and whatever the serjeant mumbles, it is the paper book that is the text; and the court as little meddles with as minds what is done of that sort at the bar; but the questions that arise are considered upon the paper book. All the rest of the business of the court is wrangling about process and amendments, whereof the latter had been mostly prevented, if the court (as formerly) had considered the first acts of the cause at the bar when offered by the serjeants," Lives of the Norths i 27-28.

rules from all periods in the history of the law, no one of which it was possible to disregard. It is therefore easy to see why litigants eagerly welcomed a form of action which, as we shall now see, was free from very many of these manifold and glaring defects.

Firstly, the action of ejectment was an action of trespass. Therefore the mesne process in it was speedy compared with that of the real actions.[1] Secondly, "the form of action was always the same, without regard to the source or nature of the lessor's title, or the character of the disseisin, deforcement, or ouster. This dispensed with the delicate task of selecting a writ exactly suited to the nature of each particular case, and the necessity of tracing or disclosing the demandant's title or specifying the character of the ouster."[2] In every case the plaintiff must show that his lessor had a right to enter, by proving a possession within the period of twenty years allowed by the statute of James I.,[3] "or accounting for the want of it, under some of the exceptions allowed by the statute."[4] In every case a plaintiff, who recovered in the action, recovered exactly what he was entitled to as against the defendant; and anyone else who had a better right could sue such a plaintiff, and recover in a similar manner, according as he was entitled.[5] Thirdly, though, as we shall see, some of the rules which governed the real actions were applied to the action of ejectment when it was adapted to the new task of trying the title to freehold,[6] the courts never applied to it those requirements of minute verbal accuracy which governed the real actions. Many cases in the seventeenth century expressly contrast it with the real actions in this respect.[7] Similarly, the courts were always ready, even in the early years of the seventeenth century, to amend verbal slips in the pleadings, in order to do substantial justice;[8] and this readiness to amend with this object became even more strongly marked at the end of the seventeenth and in the eighteenth centuries.[9] In 1698 Holt refused to allow a technical

[1] Vol. iii 626-627; vol. iv 534; vol. vi 626-627; below 16.

[2] Sedgwick and Wait, Ejectment, Essays A.A.L.H. iii 616; cp. vol. ii 520-521.

[3] Below 20, 68-69; for the statute 21 James I. c. 16 see vol. iv 485; below 20, 64.

[4] Taylor d. Atkyns v. Horde (1757) 1 Burr. at p. 119.

[5] "He who enters under it [a judgment in the action of ejectment] in truth and in substance can only be possessed according to right, prout lex postulat. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor; and in respect of the freehold, his possession enures according to right. If he has no title, he is in as a trespasser, and without any re-entry by the true owner, he is liable to account for the profits," ibid at p. 114.

[6] Below 17-19.

[7] Wright v. Wheatley (1600) Noy 37; Royston v. Eccleston (1623) Cro. Jac. 654.

[8] Marsh v. Sparrey (1617) Hob. 249; Adams v. Goose (1606) Cro. Jac. 96; Brigate v. Short (1608) ibid 154.

[9] Thus in 1758 all the judges resolved "that the nominal plaintiff and the casual ejector, are judicially to be considered as the fictitious form of an action really brought

objection after verdict,[1] which had been allowed in 1622;[2] and the court of Common Pleas in 1774[3] permitted an amendment, which Holt had refused to allow in 1701.[4]

It is not surprising, therefore, that freeholders soon showed a desire to avail themselves of this form of action, to try the title to their property. They had been introduced, so to speak, to the advantages of the ownership of a term of years, as contrasted with an estate in fee simple, by the practice of conveying land for long terms of years, in order to escape from the incidents of tenure by knight service,[5] and in order to gain a more complete freedom to dispose of their property both inter vivos and after death.[6] No doubt this practice helped to popularize the action of ejectment.[7] And we shall see that the courts, so far from obstructing the desire to use this action, soon showed themselves willing and eager to adapt the action to its new use. The reason is not far to seek. The real actions were the monopoly of the court of Common Pleas;[8] the action of ejectment could be brought in any of the three common law courts.[9] Thus the judges of the King's Bench and

by the lessor of the plaintiff against the tenant in possession; invented under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangled in the nicety of pleadings on either side," Aslin v. Parkin 2 Burr. at pp. 667-668; cf. Cole, Ejectment (ed. 1857) 2, "The whole proceeding was an ingenious fiction, dexterously contrived so as to raise in every case the only real question, viz. the claimants title or right of possession, and to exclude every other, whereby the delay and expense of special pleadings and the danger of variances by an incorrect statement of the claimant's title or estate were avoided."

[1] Partridge v. Ball (1698) 1 Ld. Raym. 136.

[2] Swadling v. Piers (1622) Cro. Jac. 613.

[3] Roe d. Lee v. Ellis (1774) 2 W. Bl. 941.

[4] Anon 1 Salk. 257.

[5] Vol. iv 465, 472; vol. v 304, 306.

[6] Vol. iv 465 and n. 2; below 130-132.

[7] Gilbert, C.B., in his book on Ejectment, at pp. 2-3, says, "It seems that the long terms about this time [Henry VII.'s reign] had their beginning, and that, since such lessees could not by law recover the land itself, therefore they used to go into equity against the lessors for a specifick performance; and against strangers to have perpetual injunctions to quiet their possessions; this drawing of the business into courts of equity obliged the courts of law to come to the resolution that they should recover the land itself in an habere facias possessionem"; to the same effect is Runnington, Ejectment 5; it is possible that the fear that the court of Chancery would give a remedy if the courts of common law did not, was one of the reasons why in 1499 they allowed the lessee to recover his term in this action, vol. iii 216; certainly this reason operated in the case of the copyholder, ibid 208; but I doubt whether long terms of years were made much use of till after the statute of Uses, and in order to evade some of its effects; one of the earliest hints which we have of their existence is in connection with a device to get back the power of making a will of lands which had been taken away by the statute of Uses, vol. iv 465 n. 2; below 130; but no doubt, when the practice of creating these long terms became general, they helped the freeholder to realize advantages of the remedy of the leaseholder.

[8] Vol. i 198.

[9] Reeves, H.E.L. ii 181-182; Essays A.A.L.H. iii 617; Pelham's Case (1588-1590) 1 Co. Rep. 3a is an instance of the action being brought in the Exchequer; but the courts of common law did not allow franchise courts to make use of the action, even though the franchise extended to all personal actions, on the ground that possession of land was recovered by it; thus in Halley's Case (1628) Cro. Car. 87 a claim by the University of Oxford to conusance of this action was rejected.

Exchequer found a way to increase the profits of their courts, and therefore their own salaries, at the expense of the judges of the court of Common Pleas. We have seen that the marked declension of the business of the Common Pleas, as compared with that of the King's Bench, must be dated from the virtual supersession of the real actions by the action of ejectment.[1]

The fact therefore that the action of ejectment was favoured both by the litigant and by the judges explains its rapid growth at the expense of the real actions. That its growth was extraordinarily rapid is clear from the reports. We have seen that it was not till 1499 that it was finally decided that the term itself could be recovered by its means.[2] In 1601 Coke could say that "at this day all titles of lands are for the greatest part tried in actions of ejectments."[3] After a little hesitation,[4] it was extended to protect not only the freeholder and his lessee, but also the copyholder and his lessee;[5] and, by Blackstone's time, it had wholly superseded the older remedy for the termor, which was given by the writ of quare ejecit infra terminum.[6] Thus, if we except the case of tenure in Ancient Demesne, to which the action was not extended,[7] the common law got a remedy applicable to all interests in land, whether they were held for an estate of freehold or for a chattel interest, and whether they were held by free or copyhold tenure. Thus there was effected an assimilation in the nature of the machinery by which protection was given to landowners, which has not yet been completely effected in the nature of the tenures by which land may be held.

But, though the action of ejectment had, by its freedom from some of the most striking defects of the real actions, and by the favour of the courts, almost superseded the real actions, it had its limitations, which prevented the real actions from becoming wholly obsolete.[8] These limitations were due chiefly to the fact

[1] Vol. i 200. [2] Above 4.

[3] Alden's Case (1601) 5 Co. Rep. at f. 105b.

[4] It was decided in Stephens v. Eliott (1596) Cro. Eliza. 484 that copyholds could not be recovered by action of ejectment at common law.

[5] Melwich v. Luter (1588) 4 Co. Rep. 26a; Goodwin v. Longhurst (1596-1597) Cro. Eliza. 535; Rumnay and Eve's Case (1588) 1 Leon. 100.

[6] Bl. Comm. iii 206-207; for this writ see vol. iii 214.

[7] Alden's Case (1601) 5 Co. Rep. 105a; Doe d. Rust v. Roe (1760) 2 Burr. 1046; for this tenure see vol. iii 263-269.

[8] Hargrave, Note 155 on Litt. bk. iii § 386, says that, in his day, there had been some attempt to revive the real actions; and he cites as illustrations Tissen v. Clarke (1773) 3 Wils. 419, 541, and Carlos and Shuttleworth v. Lord Dormer, in which actions were begun by writ of right. But, as in the latter case, the writ was issued in 1775, and the proceedings to summon the Grand Assize were not taken till 1780, it is not surprising that the attempt to revive these actions proved abortive. It is clear, however, from the Report of the Real Property Commissioners, cited below 22, that some continued to be brought, though it is alleged in the Report at p. 42 that the judges discouraged them by the strictness with which they still refused to amend trifling slips in the pleadings—a course of conduct which was reprobated by the

that it was merely an action of trespass, designed to protect the interest of the lessee for years. We shall now see that nearly all of these limitations were gradually remedied by the manner in which the courts adapted the machinery and the incidents of the action to its new functions.

The Adaptation of the Action of Ejectment

The conversion of an action which was originally designed to protect a lessee from unlawful ejectment, to an action which was capable of settling questions of title to the freehold, obviously required from the courts which controlled it much skilful management. Both the machinery, and the character and incidents of the action, needed to be manipulated; and, during the course of the sixteenth, seventeenth, and eighteenth centuries, they were so skilfully manipulated, that the cases in which the action would not serve all the purposes of landowners were quite exceptional.[1] I shall trace the history of this process of adaptation under these two heads—machinery, and character and incidents.

Machinery.[2]

The action of ejectment was, as we have seen, an action of trespass in which the plaintiff, a lessee in possession of a term, complained that he had been ousted[3] by a defendant. In order to make the action available to a freeholder, it was necessary that the freeholder should begin by creating a lease for years. For this purpose he must first enter upon the land; for a person who attempted to lease or otherwise convey land without being in possession was declared to be guilty of maintenance—indeed, "it was doubted at first whether this occasional possession, taken merely for the purposes of conveying the title, excused the lessor from the legal guilt of maintenance."[4] And it would seem that there was authority to show that such an occasional entry, for the purpose of making a lease, fell within the plain words of the

Commissioners. It is possible, however, that the action of the judges was due to the fact that the settled rules applicable to such actions forbade these amendments, above 6.

[1] For these cases see below 20-22.

[2] The best account is given in Bl. Comm. iii 199-206; the most amusing and dramatic account of the whole proceeding is to be found in Samuel Warren's novel, Ten Thousand a Year.

[3] The term ouster is a general term applicable to a dispossession either of the freehold or of a chattel real, Bl. Comm. iii 167, 198.

[4] Bl. Comm. iii 201, citing 1 Ch. Rep. App. pp. 75-76; and this doubt appears in the title to a precedent given by West in his Symboleography (ed. 1615) Pt. I. § 449; the title is as follows: "A lease for yeares whereupon an *Ejectione firmæ* may be brought, which must be delivered upon the lands leased, and commenced some day before the date thereof, which some thinke to be without the compass of the Statute of buying of titles."

statute of 1540, which required a lessor to have been in possession a year before the making of the lease, on pain of forfeiting the land thus leased.[1] The person claiming the freehold therefore entered upon the land, and, being thus in possession, he made a lease to a lessee and left him in possession. The lessee remained in possession till the tenant of the land or any other person ejected him. The lessee could then bring the action of ejectment against the tenant, or any one else who had ejected him. Such other person, who might be wholly unconnected with the land, was known as the "casual ejector."[2] But it soon became clear that the casual ejector, the lessor of the plaintiff lessee, and the lessee, might all be conspiring to deprive the actual tenant of his land. To obviate this abuse, the courts made a rule that a plaintiff could not recover land against a casual ejector, without giving notice to the tenant by delivering to him a copy of the declaration in the action. The tenant was thus enabled to intervene if he wished to do so.[3]

The plaintiff, in order to succeed in his action, must prove four things: firstly the lease under which he claimed, secondly his entry under the lease, thirdly his ouster by the defendant, and fourthly the title of his lessor to grant the lease. It was the need to prove this fourth point which brought in the question of the title to the freehold; and, when the action was used to try title, it was the only real point in the case. The preliminary lease, entry, and ouster were merely machinery. But they were necessary machinery; and the whole complicated process was gone through[4] till the time of the Commonwealth, when a method was invented[5] which rendered it unnecessary in almost all

[1] 32 Henry VIII. c. 9 § 2; this statute was held to apply to a lease for years in Partridge v. Strange and Croker (1553) Plowden at p. 87; and to a lease made to try the title Gerrarde v. Worseley (1581) Dyer 374a; but Coke said, Co. Litt. 369a, b, that it did not apply to such a lease, because "it is in a kind of course of law," unless the lease were made to a great man "to sway the cause"; and this opinion seems to have prevailed, see Hawkins, P.C. bk. i c. 86; probably it was for this reason that the purpose with which the demise was made was recited, West, op. cit. § 449; Bridgeman, Precedents (ed. 1690) 34, 83.

[2] At first it seems to have been thought that the tenant, or someone connected with him, should eject; thus in Wilson v. Woddel (1609) 1 Brown. and Golds. 143 the court thought it necessary to decide that a servant of the defendant was a sufficient ejector; S.C. Yelv. 144; in 1670-1671 Hale, C.B., giving evidence before a committee of the House of Lords, said that "sometimes they would send an ejector of their own which, if known, was not allowed," Hist. MSS. Com. 9th Rep. App. Pt. ii 6.

[3] Lilly, Prac. Reg. tit. *Ejectment;* Bl. Comm. iii 202.

[4] Thus it would seem from the case of Weekes v. Mesy (1612) 1 Brownl. 128-129, and from the pleadings in Powsely v. Blackman (1621) Cro. Jac. 659, that the whole process of lease entry and ouster was gone through; see Gilbert, Ejectment 7; Reeves, H.E.L. ii 180.

[5] It is attributed to Rolle, C.J., by Blackstone, Comm. iii 202-203; it is fairly obvious, from a somewhat confused note in Style's Rep. 368, that in 1652 the device was new, as it was only in the Upper Bench that the court would compel the tenant to confess lease entry and ouster at the suit of a casual ejector; probably Hale was

cases.[1] This new method, after a little hesitation at the beginning of Charles II.'s reign,[2] was soon generally adopted; and it continued to be used till the reforms of the nineteenth century. It depended, as Blackstone says, "upon a string of legal fictions." "No actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant; but all are merely ideal for the sole purpose of trying the title."[3]

The way in which this result was secured was as follows: A lease for years was stated to have been made by the person claiming title (whom we will call Smith) to a lessee—John Doe. John Doe was stated to have entered, and Richard Roe—the casual ejector—was stated to have ejected him. For this ejectment John Doe brought his action against Richard Roe; but, so soon as the action was begun and the declaration delivered, Richard Roe sent a written notice to the tenant in possession of the lands (whom we will call Saunders), signed "your loving friend Richard Roe," stating that an action had been brought against him by John Doe and that he did not intend to make any defence, and therefore advising Saunders to appear in court and apply to be made defendant in the action.[4] Upon Saunders making this application, he was allowed to come in and defend, upon the terms of admitting the fictitious lease by Smith to Doe, the fictitious entry by Doe, and Doe's fictitious ouster by Roe. Thus the real point at issue, namely, whether Smith the plaintiff or Saunders the defendant had the better title, was the only point left to be decided by the court. The action to try this point was entitled *Doe d.*[5] *Smith v. Saunders.*

This string of fictions was well adapted for its purpose. If the tenant did not comply with the invitation of "his loving

right when he said that the device grew up gradually—"there was never any order made of confessing lease entry and ouster, but it grew on insensibly," Hist. MSS. Com. 9th Rep. App. Pt. ii 6.

[1] There must have been an actual entry to avoid a fine, Runnington, Ejectment 195, 199-200; also the old practice was followed when the premises were vacant, as no declaration could then be delivered, ibid 148; and, as we have seen, the new method could not be employed by inferior courts, ibid 151; above 8 n. 9.

[2] In Keyes v. Bredon (1664) 1 Keble 705, a case in which the defendant in error had got a release from his casual ejector and pleaded it to the writ of error, "Keeling conceived that this way of ejectment is a new device since the late troubles, and ought to be set aside, rather than be prejudicial to any; and by Hide, Chief Justice, so it was in C.B. in the case of *The Lady Anne Holburn and my Lord Leicester*, because the right never came in question."

[3] Comm. iii 203; cp. Cole, Ejectment (ed. 1857) 1, 2 "The action was commenced (without any writ) by a declaration, every word of which was untrue . . . and (curiously enough) the only matter in issue was a fact or point not alleged in the declaration, viz. whether the claimant on the day of the alleged demise, and from thence until service of the declaration, was entitled to demise the property claimed"; for the forms used see Bl. Comm. iii App. II.

[4] An early instance of this practice is to be found in 1668, Hist. MSS. Com. 8th Rep. App. Pt. i 121 no. 164.

[5] I.e. on the demise of.

friend" the casual ejector, and apply to be made defendant, the plaintiff got judgment against the casual ejector, and the tenant was turned out of possession.[1] If the tenant did comply with this invitation, and was allowed to defend on the terms of admitting the fictitious lease entry and ouster, and then at the trial failed to appear and admit them, the plaintiff was non-suited in his action against the tenant, because he could not prove the lease entry and ouster; but, being put in the same position as if the tenant had never appeared at all, he got judgment against the casual ejector, and the tenant was turned out of possession.[2] If the tenant appeared, and, in compliance with his undertaking, admitted the fictitious lease entry and ouster, the question whether the real plaintiff Smith—the lessor of the nominal plaintiff Doe—or whether the tenant Saunders had the better title, was tried on its merits.

Obviously, if the abuse of this machinery was to be prevented, a great deal of supervision by the court was required. Lord Mansfield truly said,[3] that the action was "in form a trick between two to dispossess a third by a sham suit and judgment," and that "the artifice would be criminal unless the court converted it into a fair trial." The courts did keep a very tight hand over the management of this machinery, with the result that it became so fair a trial that, as we have seen,[4] litigants whenever possible made use of it. Let us take three illustrations of this control.

(i) When the device of Rolle, C.J., was adopted, it was obvious that, as lease entry and ouster were fictitious, the lessee who entered, and the casual ejector who ousted him, were likely to become equally fictitious. But the courts at first insisted that the lessee should be a real person, because otherwise the defendant might lose his costs.[5] On the other hand, they recognized very early that the lessee was merely a nominal plaintiff, so that it was ruled that no advantage could be taken if he died in the course of the action;[6] and that if he released the action "it was a contempt."[7] But, as in fact the lessee-plaintiff always was

[1] Bl. Comm. iii 203.

[2] Ibid iii 204-205; Turner v. Barnaby (1704) Salk. 260; cp. 1 Keble 28; but it should be noted that "judgment against one's own ejector cannot be entered till the postea returned and endorsed that the non-suit was for want of confessing lease, entry, and ouster," 1 Keble 246.

[3] Fairclaim v. Shamtitle (1762) 3 Burr. at p. 1294.

[4] Above 9; see also below 22.

[5] Henloe v. Peters and Buck (1572) 2 Lev. 66; Anon (1705) 6 Mod. 309, "*Per Curiam*. It is a great abuse in ejectment, that people make nominal lessees persons not in rerum natura, or at best not known to the defendant; so that he thereby may lose his costs. And *per omnes*, the attorney that does so ought to pay costs."

[6] Addison v. Otway (1677) 3 Keble at p. 772; Moore v. Goodright (1731) 2 Str. 899.

[7] Anon. (1706) 1 Salk. 260.

fictitious, the difficulty felt earlier by the courts as to costs was got over by making the plaintiff's lessor—i.e. the real plaintiff in the action—undertake to pay the costs if judgment was given for the defendant.[1]

(ii) From the first there had always been a risk that a plaintiff and a casual ejector might conspire to turn the tenant out of possession; and, for that reason, we have seen that the courts had made a rule that judgment could not be recovered against a casual ejector, unless notice had first been given to the tenant.[2] This rule became doubly necessary when Rolle, C.J.'s device was adopted; and, for that reason, the rules as to the kind of notice to be given to the tenant were made very much more strict.[3] But it soon became clear that mere notice to the tenant in possession was not always sufficient. The tenant in possession, the plaintiff, and the casual ejector, might all join in a conspiracy to defraud the landlord of his property. Therefore the courts laid it down that the landlord could always apply to be made defendant.[4] But it might happen either that the landlord did not hear of the action till it was too late, or that the tenant (as would very likely happen if there was collusion) did not defend at all. It is true that it was laid down in 1699 that, "if notice in ejectment be given to an undertenant, and he does not acquaint his landlord therewith, but suffers judgment to go against him, the court, upon motion, will not suffer execution to be taken out until the right be tried."[5] But this was a solitary dictum; and it was not very consistent with the rule, which had been laid down in several cases, that the court had no power to allow the landlord to defend instead of the tenant, in cases when the tenant did not defend at all.[6] To remedy these defects, and to clear up doubts, it was enacted in 1738,[7] firstly, that if tenants, to whom notices in ejectment were delivered, did not inform their landlords

[1] It is curious that, though Blackstone, Comm. iii App. II., gives the consent rule in this form, he repeats, ibid iii 203, the old objection to nominal lessees, citing 6 Mod. 309.

[2] Above 11.

[3] "Now by this new practice, which is to deliver a copy of the declaration in ejectment to the tenant in possession or his wife . . . there must be upon that copy an endorsement or subscription in English acquainting the tenant what the thing is; which endorsement or subscription or the substance thereof must be read to the tenant by the person who delivers the same, at the time of the delivery thereof: Which person must also tell the tenant that unless he shall forthwith procure some attorney of the King's Bench or other court where his action is brought to appear for him and defend his title (if he hath any) he shall be turned out of possession, or words to that effect," Lilly, Prac. Reg. (ed. 1719) i 498-499, Tit. *Ejectment*.

[4] Fenwick v. Gravenor (1702) 7 Mod. at p. 70 *per* Holt, C.J.; S.C. 1 Salk. 257.

[5] Anon. 12 Mod. 211.

[6] See Harvey's argument in Fairclaim v. Shamtitle (1762) 3 Burr. at pp. 1296-1298.

[7] 11 George II. c. 19 §§ 12 and 13.

of the fact they were to forfeit three years' rent of the premises; and, secondly, that the court should have power, not only to join the landlord as a defendant with the tenant, but also to admit him to defend the action alone, if the tenant did not appear. This statute is remarkable as being the only instance, before the reforms made by the legislation of the nineteenth century, in which the development of the action by the courts was interfered with by the legislature.

(iii) In the days when the action of ejectment was an action of trespass brought by lessees, plaintiffs could recover, not only the land, but damages for the mesne profits of which they had been deprived in consequence of the ouster.[1] It is clear that such damages were recovered in the action in the sixteenth century.[2] But, when the lessee in the action was merely made lessee in order to figure as a nominal plaintiff, and still more when he became a mere fiction, it is clear that damages for his ouster must become merely nominal. Hence it was necessary to give the real plaintiff, who had succeeded in the action, the further remedy of an action of trespass, in which he could recover the mesne profits of the land, and any other damages which he had suffered in consequence of his being deprived of its possession.[3] Thus the action for mesne profits arose, because there was needed an action which was, to use Lord Mansfield's words, "consequential to the recovery in ejectment."[4]

These three illustrations show very clearly the skill with which the courts manipulated the elaborate machinery which had been devised to adapt the action of ejectment to its new function of trying the title to the freehold. We shall now see that they showed no less skill in the way in which they made the consequential modifications in the character and incidents of the action.

Character and Incidents.

"The great advantage of this fictitious mode," said Lord Mansfield,[5] "is that, being under the control of the court, it may be so modelled as to answer in the best manner every end of justice and convenience. Public utility has adopted it in lieu of

[1] Vol. iii 214-216; Reeves, H.E.L., ii 180; Bl. Comm. iii 199.

[2] See e.g. Pelham's case (1589) 1 Co. Rep. at p. 10b; Reeves is probably right when he says, H.E.L. ii 180, that such damages could be recovered in the action of ejectment for some time after Elizabeth's reign.

[3] "An ejectment at this day, is a feigned action brought against a nominal defendant, and generally on a supposed ouster; but an action for mesne profits is wholly dependant on facts—being brought against the real tenant, for profits which he has actually received," Runnington, Ejectment 438; and see the very clear exposition by Wilmot, C.J., in Goodtitle v. Tombs (1770) 3 Wils. at p. 120.

[4] Aslin v. Parkin (1758) 2 Burr. at p. 668.

[5] Fairclaim v. Shamtitle (1762) 3 Burr. at pp. 1795-1796.

almost all real actions: which were embarrassed and entangled with a thousand niceties. But, as there was good and bad in the method of real actions, the good ought to be engrafted into ejectments in such a manner as to avoid the bad." This passage from Lord Mansfield's judgment expresses compendiously the process by which the courts so moulded a personal action of trespass that it was able to perform the function of a real action. We shall be able the better to understand the results of their work if we consider, firstly, the advantages of the personal character of the action, and the manner in which the great disadvantage of this character was remedied; and, secondly, the manner in which the courts "grafted" into it some of the characteristics of the real actions.

(i) We have seen that the fact that the action was a personal action of trespass gave it great advantages over the real actions in respect of the mesne process, in respect of its generality, and in respect of the readiness of the courts to allow amendments in pleading.[1] In fact, as early as 1612,[2] the fact that it was essentially a personal action was insisted on by Coke, in order to show that a plea of accord and satisfaction was a good plea to it,[3] though it would not have been a good plea to a real action.[4] On the other hand, owing to this very fact, it suffered from a serious defect. [Since it was an action of trespass, a verdict for the defendant in one action was no bar to another action by the same plaintiff complaining of a different trespass.[5]] A verdict for the defendant in a real action did settle the question between the parties and their representatives, so that it could not be raised again as between those parties or their representatives by the same form of action.[6] [All that a verdict for the defendant settled in an action of ejectment was that he was not guilty of the trespass of which the lessee of the plaintiff had accused him.] Hence a verdict in one ejectment was not only not conclusive, but could not even be given in evidence on the trial of another, unless the parties were the same.[7] There was nothing to prevent repeated actions on the same facts; and such repeated actions were in fact brought.[8] This was the one point in which this action was decisively inferior to the real actions.

[1] Above 7-8.
[2] Peytoe's Case, 9 Co. Rep. 77 b.
[3] At ff. 78 a and b.
[4] At f. 79b, citing Vernon's Case (1572) 4 Co. Rep. 1.
[5] Reeves, H.E.L. iii 180.
[6] Ferrer's Case (1599) 6 Co. Rep. at f. 7b—"the law has provided greater safety and remedy for matters of freehold and inheritance than for debts and chattels; for these once barred, always barred, as it has been said."
[7] Clerke v. Rowell (1669) 1 Mod. 10; cp. Strode v. Seaton (1835) 2 Cr. M. and R. 728.
[8] Ferrer's Case (1599) 6 Co. Rep. at f. 9a; below 17.

This defect was remedied by the combined action of the court of Chancery and the courts of common law. It would seem that, in the earlier half of the seventeenth century, the court of Chancery would issue injunctions against such an abuse of the procedure of the courts;[1] and the legality of such interferences to prevent vexatious litigation was upheld by the House of Lords in 1709 in the case of *Earl of Bath v. Sherwin*.[2] In that case the House, reversing a decision of Cowper, L.C., held that after five several trials at bar, in which the verdicts had all been for the plaintiff in error, a perpetual injunction ought to be granted. But the hesitation of Cowper, L.C., to grant an injunction in that very plain case showed that the action of the court of Chancery was a very uncertain remedy for this defect in the action.[3] A better remedy was devised by the courts of common law themselves in the latter half of the seventeenth century. They refused to allow a second action between the same parties till the costs of the first action were paid;[4] and, in the eighteenth century, they refused to allow a second action, whether or not it was between the same parties, if "the second ejectment was in substance brought to try the same title."[5] The rule in this form seems to have succeeded in stopping most litigants from trying to bring repeated actions on the same facts.[6]

(ii) The common law courts in 1499 had given the action one of the leading characteristics of a real action—the capacity for giving the plaintiff specific recovery:[7] the same courts, in the course of the seventeenth and eighteenth centuries, had thus given to it another of these characteristics—a certain measure of finality. Naturally, during these centuries, it attracted to itself, in a modified form, certain other characteristics of these actions. Since it was employed to assert the title to the freehold, the rules as to the matters to be proved by the plaintiff, and the defences open

[1] "Now the practice of the law is so much altered that these actions [the real actions] are seldom used; and almost antiquated; and instead thereof actions of trespass, of ejectione firmæ, of replevin are come up, whereby men are put out of their lands, and mean men are returned upon juries, which then they were not; . . . . But let the practice of the law be reduced to what it was in those times, and let no man be dispossessed of his land, but by a judgment upon a real plea, and the Chancery will meddle with no such judgments," Jurisdiction of the Court of Chancery Vindicated, 1 Ch. Rep. App. 57.

[2] 4 Bro. P.C. 373.

[3] "Should the court decree that two, three, or more unsuccessful trials by ejectment shall be peremptory, the court would be very far from doing justice in all events; for proceedings at common law are tied up to very strict rules, and a man who has a very good title may be cast through some slip in the proceedings, or a man may have better evidence at one time than another," *per* Cowper, L.C., 10 Mod. at p. 2.

[4] Anon. (1699) 1 Salk. 255; and Cowper, L.C., 10 Mod. at p. 2, favoured this expedient.

[5] Kene d. Angel v. Angel (1796) 6 T.R. 740.

[6] Below 22. [7] Above 4.

to the defendant, necessarily depended upon those substantive rules of the law of real property which had grown up round the real actions; and for the same reason some of the rules of procedure in those actions were also applied. Let us take one or two illustrations of the way in which (*a*) these substantive rules of law, and (*b*) these rules of procedure, were applied to this action.

(*a*) We have seen that the plaintiff in this action must show that he had a right of entry.[1] A person having such a right might either bring the action or actually enter. If he entered, the legal effect of his entry was governed by the principles laid down by Littleton and Coke for estates of freehold. It gave him legal seisin or possession according to his title; and any previous tenants who remained without his leave and licence became trespassers.[2] Obviously this rule furnished him with a good defence to an ejectment subsequently brought against him by the tenants whom his entry had disturbed.[3] Again, just as a collateral warranty could be pleaded in a real action to bar the plaintiff's title, so it could be given in evidence in an action of ejectment.[4] The rule that a landlord might, by the leave of the court, be made a co-defendant was compared by Blackstone to the rule that, "if in a real action the tenant of the freehold made default, the remainder-man or reversioner had a right to come in and defend the possession."[5] (*b*) The form of the writ of ejectment was not improbably suggested by the form of the writ in some of the real actions.[6] On the other hand the same verbal nicety[7] in the description of the property which the plaintiff sought to recover was not needed.[8] But, for a considerable period, the rules as to the manner in which the property must be described were strict; and this strictness was justified on the ground that, if the property was not properly described, the sheriff would not know what land he was ordered to deliver to a successful plaintiff.[9] On questions

[1] Above 7; below 20-21.

[2] Co. Litt. 245, 252b; Butcher v. Butcher (1827) 7 B. and C. 399; Cole, Ejectment (ed. 1857) 67.

[3] Cole, op. cit. 67.

[4] Edward Seymor's Case (1613) 10 Co. Rep. at f. 97b.

[5] Comm. iii 204.

[6] Gilbert, Ejectment (ed. 1734) 6, 7; Runnington, Ejectment 137.

[7] Above 5, 7.

[8] Gilbert, Ejectment 54-57.

[9] The principle is thus explained by Gilbert, Ejectment (ed. 1734) at pp. 57-58: "The design of the law in this action is to have the thing demanded so particularly specified that the sheriff may certainly know what to give the possession of, if the plaintiff should recover. . . . And as they extend the action further than the Præcipe (i.e. the real actions), and allowed some things to be recovered in this action which could not be demanded in the Præcipe, because since the establishment of that real action many things have been added and improved by art, and acquired new appellations, . . . and as men began to contract by new names, . . . so it was reasonable to suffer the remedy to follow the nature of such contracts; yet they could not extend this action so far as they went in the Assize . . . ; because the recognitors, having

of pleading the analogy of the real actions was sometimes directly appealed to;[1] and the same analogy was resorted to to explain the effect of a judgment for the plaintiff in this action.[2]

Thus the action of ejectment was, to use the expressive phrase of Wilmot, C.J., "licked into the form of a real action."[3] This operation was carried out so skillfully that, as we shall now see, it sufficed for nearly all the needs of landowners—but not for all. In spite of the efforts of the judges, the action still had its limitations.

The Limitations upon the Sphere of the Action of Ejectment

The action of ejectment was a common law action; and therefore, like all other common law actions, no account could be taken of merely equitable titles. The plaintiff must prove a legal right to enter. It would be hardly necessary to allude to a limitation, which this action shared with all common law actions, had not Lord Mansfield attempted in this, as in other branches of the law, to anticipate the Judicature Acts by allowing a plaintiff to set up a purely equitable title. Thus, in the case of *Weakly v. Bucknell*,[4] he allowed a mere agreement for a lease to be set up as a defence to the lessor's action of ejectment—"If the court were to say this ejectment ought to prevail, it would merely be for the sake of giving the court of Chancery an opportunity to undo all again. If the lessor of the plaintiff should recover at law, equity would immediately set it right, and he would be obliged to pay the costs of both suits";[5] and Buller, J., went even further in the same direction.[6] But these decisions were over-

the view of the thing demanded in the Assize, must have more certain knowledge of the thing demanded than could be given in the Ejectment"; but the strict rules, introduced on this principle, were gradually relaxed as we may see if we compare the cases like Wood v. Payne (1590) Cro. Eliz. 186; Ashworth v. Stanley (1652) Style 364; Martyn v. Nichols (1640) Cro. Car. 573; Knight v. Syms (1693) 1 Salk. 254; with the case of Connor v. West (1770) 5 Burr. 2672.

[1] Goodtitle v. Alker (1757) 1 Burr. at p. 145.

[2] Thus Runnington, Ejectment 400-401, explaining that a judgment for the plaintiff gives him the right to get possession and destroys the right of the defendant, says, "Whilst the judgment stands in force it removes an intervening estate out of the way . . . and the recoverer's right to the possession will continue till the judgment be recovered or falsified in another action. Like the case where tenant in tail suffers an erroneous recovery, so long as the recovery remains in force, it is a bar to the tail, and the issue in tail has no right to the estate tail."

[3] Goodtitle v. Tombs (1770) 3 Wils. at p. 120.

[4] (1776) Cowper 473. [5] Ibid at p. 474.

[6] Thus he held in Goodtitle v. Morgan (1787) 1 T.R. 755 that a second mortgagee who took an assignment of a term to attend the inheritance, and had all the title deeds, might recover in ejectment against the first mortgagee, if the second mortgagee had no notice of the first mortgage—"It is," he said at p. 762, "an established rule in a court of Equity that a second mortgagee who has the title deeds, without notice of any prior incumbrance, shall be preferred. . . . If this has become a rule of property in a court of Equity, it ought to be adopted in a court of Law"; cp. Moss v. Gallimore (1779) 1 Dougl. 279 where Lord Mansfield approved of the rule

ruled by Lord Kenyon, C.J. In the case of *Doe v. Staple*[1] he said that, if a term outstanding in a trustee for the plaintiff were set up against a plaintiff's claim, or if a satisfied term were set up by a mortgagor as a defence to a mortgagee's action, the jury might be directed to presume a surrender of the term.[2] But obviously no such presumption could be made in the case of an unsatisfied term. In that case the trustees of the term must recover because they could show a legal title—"the jurisdiction of this court in ejectments is confined to legal titles";[3] and this was the rule which prevailed.[4] As Grove, J., said in the case already cited,[5] it was for the Legislature to remedy any inconveniences which might arise from this state of the law.

The action had also certain other limitations which were peculiar to it.

Firstly, James I.'s statute of limitation made it necessary that the plaintiff's right of entry should have accrued within twenty years of the bringing of the action.[6] If therefore he did not assert his right of entry within this period, it was gone, and with it went his right to bring ejectment. But he was not wholly without remedy, because he could still proceed by real action if he sued within the periods allowed by the statute of Henry VIII.[7]

Secondly, we have seen that certain events, or certain acts, done by the tenant, destroyed a plaintiff's right of entry.[8] In such a case therefore a plaintiff, having no right of entry, could not proceed by ejectment, but was thrown back upon his real action. We have seen that legislation had diminished the number of cases in which this might happen; but it had not wholly

allowing a mortgagee to proceed by ejectment against a mortgagor, if he gave notice to a lessee, holding under a lease made prior to the mortgage, that he did not intend to disturb his possession, but only required the rent to be paid to him; Doe d. Bristow v. Pegge (1785) 1 T.R. 758 n., where an unsatisfied term was not allowed to be set up to defeat the claim of the plaintiff.

[1] (1788) 2 T.R. 684. [2] Ibid at p. 696.

[3] "Here the facts of the case preclude any such presumption; there was an existing term at the several times of the two first demises laid in this declaration, and a considerable benefit was to be derived out of it; the last annuitant did not die till after the time of the second demise; therefore there is no reason to presume that the trustees had surrendered, and they would have been personally liable if they had. Supposing two ejectments had been brought at the same time before the death of the last annuitant, the one by the trustees of the term, and the other by the present lessor of the plaintiff, the judge could not have directed the jury to find for both; but the trustees must have recovered, for they would have shown a legal title. The jurisdiction of this court in ejectments is confined to legal titles," ibid.

[4] See e.g. Doe d. Rees v. Williams (1837) 2 M. and W. 749.

[5] Doe v. Staple (1788) 2 T.R. at p. 700.

[6] 21 James I. c. 16 § 1; vol. iv 485.

[7] 32 Henry VIII. c. 2; vol. iv 484. A plaintiff might also have been barred by a fine and five years non-claim under 4 Henry VII. c. 24, until 3, 4 William IV. c. 74.

[8] Vol. ii 585-586; vol. iv 485-486; below 32, 52-54.

removed them.[1] If the heir of a disseisor inherited the property, the disseisee's right of entry, and therefore his right to bring ejectment, was tolled by descent cast, provided that the disseisor had had peaceable possession for five years after the disseisin without entry effected, or continual claim made. The disseisee, therefore, was thrown back upon his real action.[2] Similarly, a feoffment made by a tenant in tail actually seised, operated as a discontinuance of the estate tail, i.e. it took away from the remaindermen or reversioners their right of entry, and therefore their right to bring ejectment, and compelled them to sue by real action.[3]

Thirdly, we have seen that, though the early common law had applied the doctrine of seisin very literally to incorporeal hereditaments, the law of the sixteenth century had begun to take somewhat the same view as that taken by Roman law, and to lay it down that, as there could be no physical apprehension of such things, they could not be conveyed by livery of seisin.[5] But, if a man could not have physical possession of such things, he could hardly enter upon them, or be said to have a right of entry. Therefore it was laid down that ejectment did not lie for purely incorporeal hereditaments.[6] They could only be claimed by this action if they were claimed as appendant or appurtenant to a corporeal hereditament, and together with it.[7] Such incorporeal rights, therefore, could only be asserted, either by bringing the appropriate real action,[8] or by some form of the action of trespass on the case for their disturbance. We have seen that this displacement of the real actions appropriate to the protection of these incorporeal hereditaments had already begun in the Middle Ages.[9] We have seen, too, that it had met with some opposition even as late as the earlier part of the sixteenth century ;[10] but it is clear from Coke's reports that, in the course of that century, the legality of this use of trespass on the case was fully recognized.[11] In the course of the succeeding centuries this form of action came to be

[1] Vol. ii 585-586; vol. iv 483-484; below 49, 52-54. [2] Vol. iv 483.

[3] Vol. ii 585-586. In addition, the rights of a plaintiff might have been completely barred by the effect of the obligation of a warranty descending upon him, vol. iii 117-118, till 3, 4 William IV. c. 27 § 39, which made a warranty ineffectual to toll or defeat any action or entry for the recovery of land; and 3, 4 William IV. c. 74 § 14, which made all warranties entered into by any tenant in tail void as against his issue, and all persons whose estates were to take effect after the determination or in defeasance of the estate tail.

[4] Vol. iii 97-99. [5] Ibid 99; vol. v 473.

[6] Molineux v. Molineux (1607) Cro. Jac. at p. 146; Herbert v. Laughlwyn (1637) Cro. Car. 492; Bl. Comm. iii 206.

[7] Crocker v. Fothergill (1819) 2 B. and Ald. at p. 661 *per* Holroyd, J.

[8] For these see vol. iii 19-20.

[9] Ibid 27-28. [10] Ibid 28 n. 4.

[11] Earl of Shrewsbury's Case (1611) 9 Co. Rep. at f. 51a, where it was ruled that a plaintiff might sue either by assize or by action on the case; Aldred's Case (1611) 9 Co. Rep. 57b.

as generally used by those entitled to incorporeal, as the action of ejectment was used by those entitled to corporeal hereditaments.[1]

These limitations on the sphere of the action of ejectment appear to be somewhat formidable in theory—indeed, Hargrave expresses surprise that, having regard to the second of them, the real actions so quickly decayed.[2] But, in fact, the manifold defects of the real actions so largely outweighed these limitations on the sphere of the action of ejectment, that in practice they were inconsiderable. The Real Property Commissioners reported in 1829[3] that, "It would have been beneficial to the community if real actions had been abolished from the time when the modern action of ejectment was devised. Within the last hundred years many real actions have been brought after the remedy of ejectment was barred, but we cannot learn that more than one or two succeeded. They have generally originated in schemes of unprincipled practitioners of the law to defraud persons in a low condition of life of their substance, under pretence of recovering for them large estates; to which they had no colour of title." This view is confirmed by the findings of the Commissioners who reported on the Courts of Common Law in 1830.[4] "Experience," they said, "has shown that the proceeding by ejectment, though possession only is thereby recovered, and no right conclusively established, is nevertheless considered a more eligible course for recovering corporeal hereditaments . . . than any of the forms of real actions; for these actions are never adopted so long as the right to maintain an ejectment remains open. . . . With respect to those incorporeal hereditaments which are not the subject of an action of ejectment, a recourse to experience equally shows that the remedies which the law affords for recovering profits or damages for disturbance of rights are resorted to by suitors for the trial of their titles, in preference to any of the forms which the register [of writs] supplies for the recovery of the rights themselves."

When the real actions were, with three exceptions,[5] abolished

[1] Second Report of the Commissioners on the Courts of Common Law, Parlt. Papers (1830) xi at p. 6, cited below.

[2] Co. Litt. n. 155 to Litt. bk. iii § 386.

[3] First Report, Parlt. Papers, 1829, x at p. 42.

[4] Second Report, Parlt. Papers, 1830, xi at p. 6.

[5] The three exceptions were the writ of right of Dower, the writ of Dower unde nihil habet, and a Quare Impedit; for these actions see vol. iii 20-21, 25; as Maitland explains, Forms of Action 302, "the Quare Impedit had become the regular action for the trial of all disputes about advowsons, and, as Ejectment was here inapplicable (because an advowson was an incorporeal hereditament), this had to be spared. There were special reasons for saving the two writs of Dower, since the doweress could not bring Ejectment until her dower had been set out." The Commissioners recommended that simpler substitutes should be found for these actions, Parlt. Papers, 1829, x 41; but this recommendation was not followed till the Common Law Procedure Act of 1860, 23, 24 Victoria c. 126 §§ 26, 27.

in 1833 by the Real Property Limitation Act,[1] ejectment was left the only action for the recovery of interests in land. This Act reformed the law as to the period within which owners could bring their actions to recover their interests in land; and it got rid of the limitations on the sphere of the action arising from the operation of the doctrines of descents cast and discontinuances.[2] But it was not till the forms of action were wholly abolished by the Judicature Act of 1873, that the rule that ejectment would not lie for a purely incorporeal hereditament became meaningless;[3] and it was not till the fusion of courts created by that Act that Lord Mansfield's ideal was realized, and that effect could be given in an action for the recovery of land to both the legal and the equitable rights of landowners. The result of these changes is that the only limitation on the sphere of the action for the recovery of land is one which it has in common with all other actions—liability to be barred by the statutes of limitation.

All these changes were in the distant future at the end of the seventeenth century. The gradual manner in which the action of ejectment had in practice displaced the real actions, coupled with the continued legal possibility of bringing a real action, and the limitations upon the sphere of the action of ejectment, preserved a good deal of the old law as to seisin which centred round the real actions. At the same time, the new law as to seisin and possession, which was springing up round the action of ejectment; the new principles introduced into this branch of the law by the statutes of limitation; the new powers of dealing with the legal estate in land, which landowners had acquired in consequence of the statutes of Uses and Wills; and the new modes which the conveyancers had invented of exercising those powers—all, as we shall now see, contributed to make the law as to the seisin possession and ownership of interests in land one of the most complicated and difficult branches of the common law.

§ 2. Seisin, Possession, and Ownership

That changes in procedure, changes in the manner of acquiring property by lapse of time, and the growth of new forms of ownership, have far-reaching effects upon the legal doctrines prevailing in any given legal system as to ownership and possession, is clearly indicated by the history of Roman law. In Roman law the rise of the prætorian actio Publiciana, which protected

[1] 3, 4 William IV. c. 27 § 36; for this, and §§ 37-39 of the Act, see App. I.
[2] 3, 4 William IV. c. 27 § 39.
[3] See Maitland, Forms of Action 354-355.

a usucapion possessor and a bonitarian owner,[1] the rise of the prætorian system of longi temporis præscriptio,[2] and the protection given by the prætor to the possession of provincial land and to the alien,[3] introduced many elements of complication into the Roman system of dominium and possessio,—elements unknown to the earliest period in the history of the law, which knew only dominium ex jure Quiritium,[4] and to the somewhat later period which recognized also interdict possession.[5] So in the English law of this period, the rise of the action of ejectment;[6] the operation of the statutes of limitation of Henry VIII.'s and James I.'s reigns;[7] the growth of new forms of legal and equitable ownership as the result, partly of the statutes of Uses and Wills, and partly of the doctrines of the court of Chancery;[8] and the growth of new forms of conveyance, which did not have the effects of the feoffments, fines, and recoveries of mediæval law[9]—all introduced many new rules and distinctions and complications into the law as to the seisin possession and ownership of land, which were unknown to the mediæval common law. These changes and developments would at any time have considerably confused the law; and they caused the greater confusion, in that they occurred at a time when the doctrines of the mediæval common law as to seisin and possession were being rapidly elaborated and modified.

Firstly, changes in the rules of the common law necessarily produced an elaboration in the terminology of this branch of the law. Thus the fact that the interests of the copyholder and the lessee for years were now fully recognized and protected by the common law,[10] made it necessary to reconcile the rule that two persons cannot at the same time both exclusively possess the same thing,[11] with the fact that both these classes of persons had some sort of seisin or possession, which coexisted with the seisin of the freeholder. We have seen that in the Middle Ages a similar need had been met by the doctrine of estates in the land;[12] and a legal system, which had evolved this doctrine, did not find much difficulty in accommodating its phraseology and its doctrines to this new situation. Thus, in the case of copyhold, it

[1] Girard, Droit Romain (2nd ed.) 341-344.
[2] Ibid 293-294.
[3] Ibid 345-346.
[4] Gaius II. § 40; cp. Girard, op. cit. 255-258.
[5] Girard points out, op. cit. 270, that it is clear from Plautus that the interdicts retinendæ possessionis were known in the middle of the sixth century A.U.C.; and, op. cit. 272, that it is clear from Cicero that the interdicts recuperandæ possessionis were well known in his day.
[6] Above 8-9.
[7] Vol. iv 484-485; below 51-52.
[8] Vol. iv 474-475; vol. v 304-309; vol. vi 641-644; below § 4.
[9] Below 356-362.
[10] Vol. iii 208-209, 216-217.
[11] Ibid 96.
[12] Vol. ii 350-352; vol. iii 96.

came to be recognized that, the lord is seised of the freehold, but the copyholder is seised of his tenement 'as of freehold' at the will of the lord according to the custom of the manor."[1] In the case of the lease for years, the lessee was said to be possessed of the land, even as against the freeholder, who was seised of the freehold;[2] and we shall see that the power, thus given, to create a possession vested in a termor, side by side with a seisin vested in a freeholder, was used by the conveyancers of the seventeenth and eighteenth centuries, to provide a security for the payment of the sums provided in a strict settlement for jointures and portions, without disturbing the devolution of the seisin to the eldest son limited by the settlement. To express the difference between the actual entry which gave seisin, and the right to get seisin which the heir had on the death of the ancestor, and the reversioner or remainderman had on the determination of the particular estate, the term seisin in law[3] had by Coke's day[4] been coined. Such persons had a seisin in law, which was of course lost if a stranger abated on the heir, or intruded on the interest of the reversioner or remainderman. Similarly, the growth of diverse technical terms used to express the different forms of disseisin and dispossession—discontinuance,[5] abatement,[6] intrusion,[6] deforcement,[6] and ouster[7]—illustrates the need for distinguishing between the many various circumstances under which a disseisin or dispossession could take place.

Secondly, the common law was beginning to acquire some detailed rules as to the acquisition and loss of possession.[8] The rules as to what would amount to a livery of seisin were very fully elucidated in the Middle Ages;[9] and much the same rules as were applied to determine what would be a good livery of seisin, were applied to determine whether a person, entering by virtue of a right to enter, had acquired seisin. Thus Littleton says,[10] "If a man will infeoff another without deed of certain lands and tenements which he hath in many towns in one county, and he will deliver seisin to the feoffee of parcel of the tenements

[1] Pollock and Wright, Possession 49, citing 1 Co. Rep. 117a, and 1 Saunders 147.
[2] Ibid. [3] Ibid 50.
[4] Co. Litt. 31a; probably the term, as a technical term, was comparatively new—at f. 31a he talks of a "seisin in law or a civil seisin," and at f. 11b he talks of a "freehold in law," which was the expression used by Littleton § 448; Marowe, in his Reading De Pace of 1503, speaks of "possession en fait" and "possession en ley," Putnam, Oxford Studies in Social and Legal History vii 351; this comes nearer to the later terminology; the view that the term "seisin in law" is relatively modern seems to be accepted by Maitland, Forms of Action 324; P and M ii 60.
[5] Vol. ii 585-586; vol. iv 483; above 21.
[6] Vol. iv 485 and n. 9, 486 and n. 1. [7] Above 10 n. 3.
[8] For the beginnings of this process see vol. ii 282, 352-353; vol. iii 97-99, 221-224.
[9] Vol. ii 352-353; vol. iii 221-224. [10] § 418.

within one town in the name of all the lands and tenements which he hath in the same town, and in other towns, etc., all the said tenements, etc., pass by force of the said livery of seisin to him to whom such feoffment in such manner is made. . . . *A multo fortiori*, it seemeth good reason that when a man hath title to enter into the lands or tenements in divers towns, in the same county, before entry by him made, that by the entry made by him into parcel of the lands in one town in the name of all the lands and tenements to which he hath title to enter within the same county, this shall vest a seisin of all in him; and by such entry he hath possession and seisin in deed, as if he had entered into every parcel." These rules show that the acquisition of seisin by livery, or in pursuance of a right to enter, was favoured. A pointed illustration of this principle is found in the well-known case in the Book of Assizes, in which it was held that, where a man had a right of entry, and he got his body half through a window, and was then ejected, he had acquired seisin by his unsuccessful effort to get into the house.[1] Another illustration of this idea is to be found in the rule stated by Littleton,[2] and traceable continuously from his day to the modern cases,[3] that if two persons are in physical possession of land, "and the one claimeth by one title and the other by another title, the law shall adjudge him in possession that hath right to have the possession." This rule reconciles physical facts with the rule that two persons cannot at the same time possess the same thing.[4] On the other hand, taking by one who has no title is, as Sir F. Pollock says,[5] "put to strict proof." "A bare entry on another without an expulsion," said Holt, C.J.,[6] "makes such a seisin only that the law will adjudge him in possession that has the right—but it will not work a disseisin or abatement without actual expulsion." "If a man," says Perkins,[7] "enter into my lands by wrongful

[1] 8 Ass. pl. 25.

[2] § 701; to the same effect Y.B. 19 Hy. VI. Mich. pl. 49 p. 28b *per* Newton.

[3] Willion v. Berkley (1561) Plowden at p. 233 *per* Dyer, C.J.; Perkins, Profitable Book § 218; Pollock and Wright, Possession 24-25; the best modern statement of the rule is that of Maule, J., in Jones v. Chapman (1847) 2 Exchq. at pp. 820-821, "I agree with the exception of the plaintiff in error, that the question raised by the issue of 'not possessed' is whether the plaintiff is in *actual possession* or not; but it seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by the command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser"; see also The Tubantia [1924] P. 78.

[4] Vol. iii 96.

[5] Pollock and Wright, Possession 14; and see ibid 80, and Browne v. Dawson (1840) 12 Ad. and E. 624, there cited.

[6] Anon. (1705) 1 Salk. 246.

[7] Profitable Book § 219.

title, and, I being there, he doth enfeoff a stranger thereof, and doth deliver unto him seisin, it is void, for he cannot give seisin before he himself hath seisin, and he hath not seisin at the time of livery of seisin, for the law shall adjudge the possession in me who have right unto the possession, because that I am present at the time of the deliverie of seisin." So, just as a livery of seisin of, or the entry of a man with a right to enter into, a part of the lands or tenements suffices for all lands and tenements in the same county,[1] so, "the keeping possession of the house or any part of the thing demised, against a tortious entry and expulsion by the lessors, is not only a possession of all that which might pass by the name of the house or of such parcel, but of all lands, etc., which are demised by one entire demise in the same county."[2]

Thus it had become obvious that the circumstances accompanying the acquisition or loss of seisin had a great deal to do with determining the character and legal effects of such acquisition or loss. It was soon seen that, in order to interpret these circumstances aright, some attention must be paid to the intentions of the parties. Thus, though Littleton defined a disseisin as "where a man entereth into any lands or tenements where his entry is not congeable and ousteth him which hath the freehold,"[3] Coke is careful to cite a passage from Bracton, which emphasizes the need for the intent to disseise, in order to make an entry upon a tenant a disseisin.[4] It was recognized in 1553 that an entry by the leave and licence of the tenant, without any intention of taking or giving seisin, would not suffice to change the seisin. "If a disseisor will ask the disseisee to come to the house whereof the disseisin was made, to his daughter's wedding, or to dine with him, or the like, it shall not be an entry into the house."[5] As Sir F. Pollock says,[6] "a disseisee does not recover his seisin by going on the land at the disseisor's invitation, any more than a tenant at will is ousted by his landlord paying him a visit." The intention of the parties must be considered. If that intention is expressed in a deed or writing it is of course conclusive[7]—all that

[1] Above 25-26.

[2] Bettisworth's Case (1580-1591) 2 Co. Rep. at f. 32a. [3] § 279.

[4] Co. Litt. 153b; he there cites Bracton f. 216b who says "omnis disseysina est transgressio, sed non omnis transgressio est disseysina. Et si eo animo forte ingrediatur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseysinam sed transgressionem. [Sed quoniam incertum est quo animo hoc faciat, ideo querens sibi perquirat per assisam, et quo casu] quærendum erit judice quo amino hoc fecerit"; the passage in square brackets is not cited by Coke; as we have seen, Bracton was before his age in his insistence on intention, vol. ii 259; he had learnt the importance of intention from the canon law, ibid; and this is a striking illustration of the manner in which Coke and later writers used Bracton's works to bring up to date the mediæval rules of English Law, vol. ii 288-289; vol. iv 286.

[5] Panel v. Moor, Plowden at f. 93. [6] Pollock and Wright, Possession 80.

[7] Bettisworth's Case (1580-1591) 2 Co. Rep. at f. 32a—"And this difference was taken; when a man lawfully departs with his possession, and when a man keeps his possession against an unlawful and tortious entry. For when a man makes a feoff-

the court has to do is to interpret the document. But, in default of such a guide, the court must endeavour to elucidate the unexpressed intention from the surrounding circumstances. As we shall see, the recognition of the importance of thus ascertaining the intention of the parties, and the fact that more attention had therefore come to be paid to it, were important factors in the modification of older rules in favour of a disseisee.[1]

Thirdly, the difficulties of this branch of the law were increased by the fact that the principles underlying it were undergoing a process of modification. The tendency to connect seisin with title, which had been growing in strength during the fourteenth and fifteenth centuries,[2] was, during this period, both continued and accentuated. The introduction of the term "seisin in law," to express the position of the man who has a right to get seisin, is a significant illustration of this tendency. Such a person, though seized in law only, could take a release, and his wife was entitled to dower.[3] Thus some of the rights given to the man actually seised, and denied to a disseisee,[4] were given to him, though he was not in fact actually seised. Moreover, we shall see that the tendency to connect seisin with title was hastened directly and indirectly, both by the Legislature and by new doctrines elaborated by the courts.[5] The result was that the exceptional cases, in which the person entitled could not enter upon a disseisor, came to be limited to the cases of descent cast or discontinuance;[6] and the sphere of their operation was more and more curtailed.[7] But, though in the time of Coke the disseisee "had the land to many purposes,"[8] he could not devise it;[9] and the disseisor's rights, though they were being gradually curtailed as against the disseisee, were as against the third persons unimpaired.[10] This fact was well recognized all through this period,[11] and it is still the law.[12]

ment of a messuage *cum pertinenciis*, he departs with nothing thereby but what is parcel of the house, *scil.* the buildings, curtilage and garden."

[1] Below 34. [2] Vol. ii 586-587; vol. iii 10-11.

[3] Litt. § 448. [4] Vol. iii 91-92; below 46-48. [5] Below 32-46.

[6] Vol. ii 585-586; for curious cases arising out of the rule that there could be no remitter contrary to a record, see ibid 587 and n. 6.

[7] Vol. iv. 484; above 23; below 32.

[8] Butler and Baker's Case (1591) 3 Co. Rep. 35a.

[9] Below 48. [10] Vol. ii 583-584; vol. iii 92-94.

[11] "If a lessee for years make a feoffment, although it be a disseisin to the lessor, yet it is a good feoffment betwixt them *de facto*, though not *de jure*. . . . And warranty may be annexed to such an estate upon which he may vouch. And if such lessee for years or at will. makes a gift in tail or a lease for life, that creates a good lease or a good gift in tail amongst themselves and all other, besides the first lessor; and as to him they are both disseisors," Blunden v. Baugh (1632) Cro. Car. at pp. 304-305 *per* Jones, Berkeley and Croke, J.J.; Luddington v. Kime (1694) 1 Ld. Raym. 203, at p. 209—"admitting that Evers Armyn was a disseisor yet he had right against all persons except the disseisee, and consequently his devisee has the same right."

[12] Perry v. Clissold [1907] A.C. 73.

It followed that the importance of ascertaining whether seisin had been acquired, or a disseisin committed, still continued to be almost as great as it had ever been. The importance of ascertaining whether or not seisin had been acquired was obvious in all branches of the land law—in the law of inheritance,[1] in the new law which was springing up as to contingent remainders,[2] in the law as to curtesy and dower,[3] in conveyancing.[4] Similarly, it was often equally important to ascertain whether a disseisin had been committed, because upon that question depended the validity of dispositions made or attempted by the disseisor.[5] But the question whether or not seisin had been acquired was obscured by the statute of Uses, which made a statutory transfer of seisin possible without a physical change of possession;[6] and the manner in which the disseisor's rights had been curtailed as against the disseisee, often made the question whether or not there had been a disseisin a very difficult one to solve.[7] In fact, though the importance of ascertaining the facts of seisin and disseisin remained, the effects of the statute of Uses,[8] coupled with the modifications of some of the older consequences of seisin in favour of the person with the better right, were rendering the nature and consequences of seisin and disseisin more and more mysterious. We can see in Coke's commentary on Littleton the conflict between the mediæval and the modern doctrine.[9] The mediæval doctrine, which defined seisin as physical possession pure and simple, which insisted that a physical livery of seisin was necessary for a conveyance, which protected the man seised as against all comers, including the owner, clashed with the newer law which allowed seisin to be transferred by a mere writing, which regarded it as having a connotation of title to the freehold, which gave the owner in almost all cases a right of entry upon a disseisor. We should remember, too, that these modern tendencies in favour of title were encouraged by the fact that the modern forms of conveyance, which grew up after the passing of the statute, were all "innocent." Having no "tortious operation," they enabled an owner to convey only that to which he was entitled.[10]

If the real actions had survived, the development of the law as

[1] Vol. iii 172. [2] Below 107-109. [3] Vol. iii 187-188, 193.
[4] Ibid 221-224; below 382-383. [5] Below 41-43.
[6] Vol. iv 424-427, 475; below 35-36. [7] Below 32-46.
[8] See Pollock and Wright, Possession 55.
[9] "The law more respecteth a lesser estate by right than a larger estate by wrong, as if a tenant for life in remainder disseise tenant for life, now he hath a fee simple, but if tenant for life die, now is his wrongful estate in fee by judgment in law changed to a rightful estate for life," Co. Litt. 42b; cf. ibid 345a, b, where he deals with the conceptions of "right" and "title."
[10] Below 357; cf. Sanders, Uses (5th ed.) ii 12, 64, 77, 101.

to seisin and disseisin might, in spite of these changes, have been more continuous that it actually was. They would have kept alive the old learning; and the position of the older doctrines, in relation to the new doctrines introduced by the Legislature and the courts, would have been more precisely ascertained and understood. But the disuse of the real actions meant the loss of the key to the old doctrines of the common law as to seisin.[1] The substitution for them of the actions of trespass and ejectment meant that the lawyers approached the law as to seisin and possession from a new point of view. New doctrines as to seisin, possession, and ownership grew up round these new actions;[2] and they were pieced on to the old learning as to seisin and possession, and to the modifications of that old learning. The result was that the law on this topic was, during this period, one of the most complicated and technical parts of the common law. In fact it was a fair index to the state of many other branches of the land law. We shall see that many branches of that law were suffering from the joint effects of the survival of old doctrines, the growth of new doctrines, and the necessity of piecing together the old and the new. Indeed, the defects arising from these causes, though partially remedied by the legislation of the nineteenth and twentieth centures, are still apparent.

It is in the doctrines which grew up rouud the actions of trespass and ejectment that we can discern some of the features of our modern law as to seisin and possession. These actions were general actions—common to freeholder, copyholder, and termor alike.[3] Thus they helped to introduce some general principles common to all kinds of possession of land.[4] Moreover, we shall see that the action of ejectment also introduced a conception of an absolute right of ownership,[5] which could never have emerged from the real actions, because they were concerned merely with ascertaining which of the two parties to the action had the better right to seisin.[6] The reformers of the nineteenth century, while maintaining the root principle of the mediæval common law that, as against persons with no better right, seisin is ownership, to a large extent adopted the principles evolved by the working of the actions of trespass and ejectment. They lopped off, as we shall see, some of the anomalies which had survived from the older law, and they introduced other changes which made for simplification.[7] But, subject to these qualifications, it was the principles, evolved during the sixteenth, seventeenth, and eighteenth cen-

[1] Below 43-44.
[2] Below 57-61.
[3] See above 9 for this aspect of ejectment; it is of course equally true of trespass.
[4] Below 58-59.
[5] Below 62-68.
[6] Vol. iii 89-91.
[7] Below 78-80.

turies by the working of the actions of trespass and ejectment, which are the ground work of the law of the future.

This summary shows us that the subject falls naturally and chronologically into the following three divisions: The Modifications of the Old Doctrines of Seisin and Disseisin; The Effects of the Rise of the Actions of Trespass and Ejectment; and Lines of Future Development.

Modifications of the Old Doctrines of Seisin and Disseisin

The tendency to connect seisin with title, and therefore to give the person disseised larger powers to assert his title, is at the root of very many of the modifications of the older doctrines of seisin and disseisin. At the same time, the rights of the person seised, as against all persons other than those who could show a better title, were in no way modified.[1] Moreover, some of the disabilities of the person disseised remained; and they were accentuated by the statutes of limitation.[2] The result was a body of rules as to seisin and disseisin which were both complex and technical. I shall consider the history of this body of rules under the following three heads: (1) modifications of the rights of the person seised in favour of the disseisee; (2) the rights of the disseisor, and the disabilities of the disseisee; (3) the effects of these developments.

(1) Modifications of the rights of the persons seised in favour of the disseisee.

These modifications were based upon many different principles. They were due partly to direct legislation, but mainly to changes in legal doctrine, which were sometimes the cause and sometimes the effect of this direct legislation, and sometimes quite independent of it. It is difficult to give an intelligible account of what are a series of exceptions to the general principle that the person seised, though he is a disseisor, is prima facie the owner, invested with all the rights of the owner as against the world at large, and with a large number of these rights even as against the disseisee. But it will, I think, be found that they can be grouped under the following heads: (i) Statutory changes directly designed to modify the rights of the person seised in favour of the disseisee; (ii) developments of legal doctrine which have helped to suggest statutory changes; (iii) developments of legal doctrine suggested by statutory changes; and (iv) a development of legal doctrine unconnected with statutory changes.

(i) *Statutory changes directly designed to modify the rights of the person seised in favour of the disseisee.*

[1] Above 28; below 46.

[2] Below 46, 51-52.

We have seen that, by the end of the mediæval period, the disseisee had as a rule a right of entry upon the disseisor or his alienee; and that the two cases in which he could not thus enter were the cases in which a feoffment by a limited owner worked a discontinuance, and in which a descent was cast from a disseisor.[1] The legislation of this period, which has already been summarized,[2] limited still further the cases in which a discontinuance was possible, and modified the effect of a descent cast. A statute of 1495[3] prevented a dowress, or a woman holding lands in tail *ex provisione viri*, from being able to work a discontinuance; and, conversely, a statute of 1540[4] gave the wife and her heirs a right of entry, notwithstanding alienation made by the husband—he could no longer work a discontinuance by feoffment fine or recovery of his wife's lands. Another statute of 1540,[5] which was superseded by an improved statute of 1572,[6] provided that recoveries suffered by tenants for life and other limited owners should be void. This was interpreted to mean that suffering the recovery worked a forfeiture, so that the person next entitled had a right of entry.[7] The effect of a descent cast was modified by a statue of 1540, which enacted that it should not take away a disseisee's right of entry, unless the disseisor had had peaceable possession for five years after the disseisin, without entry effected or continual claim made.[8]

(ii) *Developments of legal doctrine which have helped to suggest statutory changes.*

Two of these developments are important in this connection: (*a*) the new importance which was beginning to be attached to the good faith of the parties to a conveyance; and (*b*) the tendency to allow the king or the other lords to get the benefit of some of the incidents of tenure, even though their tenant was disseised.

(*a*) The importance which was beginning to be attached to the good faith of the parties to a conveyance was a new phenomenon. We have seen that, in the Middle Ages, in conveyancing, as in other branches of the law, little or no account was taken of good faith or its absence. A feoffment, fine, or recovery was binding by virtue of its form. Whether it was a matter of conveyance or a question of liability, the law adopted the view that "the thought of man is not triable," and looked only at the outward acts of the parties.[9] But, during the sixteenth century,

[1] Vol. ii 584-586; vol. iii 92-93.
[2] Vol. iv 484.
[3] 11 Henry VII. c. 20.
[4] 32 Henry VIII. c. 28 § 6.
[5] 32 Henry VIII. c. 31.
[6] 14 Elizabeth c. 8.
[7] Co. Litt. 356a; L'Estrange v. Temple (1662) 1 Sid. 90.
[8] 32 Henry VIII. c. 33; for continual claim see vol. ii 585.
[9] Vol. ii 585; vol. iii 374, 375-377.

the example of the Chancery and the Star Chamber had tended to change this attitude; and the change had been hastened by the legislature. In some of the statutes, which I have just mentioned, we find assigned as the reason for their enactment the fact that limited owners had used their opportunities fraudulently;[1] and we have seen that the Legislature had passed special Acts against conveyances intended to defraud purchasers and creditors.[2] The effect of this idea upon the common law is illustrated by *Fitzherbert's Case*.[3] In that case there was a grant to a tenant for life, remainder to his son in tail. The tenant for life, in order to bar his son of his remainder by means of the doctrine of collateral warranty, leased for years to A, who then enfeoffed B in fee. A had thus disseised the tenant for life, and B had got a tortious fee simple. The tenant for life then released to B with warranty. Both A and B were parties to the fraud. The effect of such a release with warranty would normally have been to bar the son of his rights to his remainder, since the right of the son to the land under the entail, and the obligation to warrant descended upon him by two different lines of descent.[4] But, "it was resolved by Popham, Chief Justice, and the whole court that this warranty should not bar the son; for the feoffment of the lessee for years is a disseisin, and the father himself is *particeps criminis*, and agreeth to it; and then, although the release with warranty is made after the disseisin, yet forasmuch as the disseisin was to that intent and purpose, the law will adjudge on the whole act." Even the sacred fine did not escape this influence. A lessee for years leased to A for life, and then levied a fine in his favour. Then, notwithstanding the lease and the fine, he continued in possession for five years and paid the rent to the landlord. It was held that the landlord was not barred, because the fine was obviously fraudulent.[5] "The judges," says Coke, "did greatly respect the mischief which would ensue, if such fines levied by practice and covin of those who had the particular interests, should bar those that had the inheritance, and especially in the case at Bar, when after the fine levied the consusee continually paid the rent to the lessor, which made the fraud and practice apparent, and therefore the lessor was secure, and had no cause of any fear or doubt of such fraud."[6] Coke

[1] 11 Henry VII. c. 20 speaks of widows who "by covin" suffer recoveries; 32 Henry VIII. c. 36, and 14 Elizabeth c. 8 are Acts "for the avoiding of recoveries by collusion"; 33 Henry VIII. c. 33 talks of the "insatiable minds" of those who disseised others and continued seised till their death.

[2] Vol. iv 480-482.

[3] (1595) 5 Co. Rep. 79b; cf. Brediman's Case (1607) 6 Co. Rep. at f. 58a for another application of this principle to the obtaining seisin of a rent by covin.

[4] Vol. iii 117-118. [5] Fermor's Case (1602) 3 Co. Rep. 77a.

[6] Ibid at f. 79a, and cp. the other cases to the same effect cited ibid f. 80a; we may perhaps see the influence of the equitable ideas, which had had something to do

found it a task of some difficulty to reconcile this decision with the old principle that a fine was absolutely binding by virtue of its form.[1] On the whole he accomplished this reconciliation with skill and success.[2] But it is obvious that, if once the court begins to look behind the formal acts of the parties, and to consider the intent with which these acts are done, a good deal of the disseisor's freedom of action will be curtailed, and wide opportunities will be given for considering the substantial merits of the case. It is clear that such considerations will be very likely to benefit a disseise with a good title, as against a disseisor who has none.

(*b*) A tendency to allow the king or other lord to get the benefit of some of the incidents of tenure as against the disseisee, had begun to be apparent in the Middle Ages.[3] The two incidents most affected by this tendency were the two most profitable to the lord—escheat and wardship.[4] We have seen that at common law the lord was not entitled to the land as an escheat, if the disseisee died without heirs while still disseised, and that he was not entitled to the wardship of the infant heir of a disseisee;[5] but that he was entitled to an escheat if the disseisor died without heirs, and to the wardship of the disseisor's infant heir.[6] It is clear however that, from the middle of the fourteenth century onwards, these common law rules were being modified. It seems to have been recognized in Edward's III.'s reign, though not without hesitation, that, on the death of a disseisee without heirs, the lord could enter on the disseisor and claim an escheat;[7] and in Henry IV.'s reign this rule was justified on the ground that the disseisee was his tenant.[8] But in Edward III.'s reign this rule was not applied to wardship—the lord was not entitled to the wardship of the infant heir of his disseised tenant.[9] In Henry VI.'s reign, however, Fortescue, C.J., ruled that he was entitled both to escheat and wardship;[10] and, in spite of the dissent of Brian, C.J., who thought that he was

with this changed outlook of the common law, in the note at the end of the case to the effect that Egerton "commended this resolution of the judges and agreed in opinion with them."

[1] Vol. iii 240, 245.

[2] Below 41, 55-56.

[3] On this subject see Maitland, L.Q.R. ii 486-488, and Coll. Papers i 368-370; see especially the references to the Y.BB. and the other authorities set out L.Q.R. ii 487 n. 2, and Coll Papers. i 369 n. 1.

[4] For these incidents see vol. iii 61-66, 67-72.

[5] Vol. iii 92.

[6] Ibid.

[7] 27 Ass. pl. 32, ff. 136-137.

[8] Y.B. 2 Hy. IV. Mich. pl. 37.

[9] Fitz. Ab. *Garde* pl. 10, cited Maitland, L.Q.R. ii 487-488, Coll. Papers i 369-370.

[10] Y.B. 37 Hy. VI. Mich. pl. 1.

entitled to neither,[1] Fortescue's opinion prevailed.[2] [Obviously, the view that the lord was entitled to the wardship of the disseisee's heir could be, and in fact was, justified on the same grounds as his right to escheat had been justified—the disseisee, though disseised, was his tenant.[3] But it is clear that the view that the king or other lord has rights as against the disseisee, implicitly recognizes the fact that the disseisee has rights akin to rights of property. He has something more than a mere right of action to recover his seisin, for he has something which can be made the foundation of a claim by a third party.]

A somewhat exaggerated emphasis was laid upon this new view of the position of the disseisee, when it was enacted in 1541-1542[4] that, on a conviction for treason, the traitor should forfeit uses, rights, entries, conditions, as well as "possessions, remainders, reversions, and all other things." No doubt forfeiture for treason depended upon the prerogative right of the king, and not upon the principles of tenure—it was not an incident of tenure.[5] But it is clear that there is something in common between the tendency to give the king or other lord greater rights to the incidents of tenure as against a disseisee, and this extension of the king's prerogative right. Both rested on the view that disseisees have rights akin to property rights, and tended, therefore, to foster the view that such rights to land or other objects of property are as important and as real as the physical possession of such objects of property. It is not surprising, therefore, to find that it was these rights of king or lord which were adduced by Coke to prove that "the disseisee, in the judgment of law, hath the land to many purposes."[6]

(iii) *Developments of legal doctrine suggested by statutory changes.*

One of the results of the statute of Uses was to create a new distinction between the seisin which could be created and trans-

[1] Y.BB. 15 Ed. IV. Mich. pl. 17, p. 14; 6 Hy. VII. Mich. pl. 4, p. 9; 10 Hy. VII. Trin. pl. 13.

[2] Co. Litt. 76b, 368a and b; Butler and Baker's Case (1591) 3 Co. Rep. at f. 35a, cited below n. 6.

[3] "And if the tenant be disseised, and afterwards dieth without heir, etc., it seemeth the lord shall have a Writ of Escheat because his tenant died in the homage. And in that case he shall have a Writ of Right of Ward, if the tenant die, his heir being within age, and by the like reason he shall have a Writ of Escheat," F.N.B. f. 144 c.

[4] 33 Henry VIII. c. 20 §§ 3 and 4; vol. iv 500 and n. 3.

[5] Vol. iii 70.

[6] "For the disseisee, in the judgment of law hath the land to many purposes. For first he hath the land to forfeit, and therefore, if he be attainted of treason or felony, he shall forfeit the land. 2nd., if he dies without heir, the land shall escheat to the lord. 3rd., the disseisee shall compel the lord to avow on him as his very tenant. . . . And Littleton saith that the disseisee is his tenant in law. 4th., if he dies, his heir within age, the lord shall have wardship," Butler and Baker's Case (1591) 3 Co. Rep. at f. 35a.

ferred by the machinery of the statute, and the actual physical possession which was needed to support an action of trespass.[1] We have seen that the statute made it possible to transfer seisin by a mere writing without any change of the physical possession; that it made it possible for seisin to spring up and to shift at the will of a settlor; and that a settlor could reserve to himself or give to another a power to transfer the seisin in any manner which he might direct.[2] It was difficult to regard a seisin thus created and transferred as physical possession. It was obviously much more akin to a right to get possession immediately or in the future. At the same time, what the statute had allowed to be thus created or transferred, was undoubtedly seisin or actual physical possession. At first the courts took the words of the statute literally. "Note," it was said in 1586,[3] "that *cestui que use*, at this day, is immediately and actually seised and in possession of the land; so that he may have an assize or trespass before entry against any stranger who enters without title; and this by the words of the 27 Hen. 8 c. 10, viz. 'that *cestuy que use* shall stand and be seised,' etc. And this was the opinion of divers justices." But, by 1666, the courts had distinguished between the seisin given by the operation of the statute, and the physical possession needed to maintain an action for trespass. "If," it was said, "a man bargains and sells lands presently the bargainee hath actual possession; he may surrender, assign, attorn, and release; but he cannot upon this possession bring a trespass."[4] And this rule has prevailed.[5] Thus the seisin acquired merely by force of the statute of Uses has become something very different from the seisin of the thirteenth century. It has lost its necessary connection with physical control, and become in substance a right. It is clear that this fact will help to strengthen all the existing tendencies to connect seisin with title, and to divorce it from physical possession.

(iv) *A development of legal doctrine unconnected with statutory changes.*

This development of legal doctrine is the doctrine of disseisin at election. The doctrine was not originally designed to benefit a disseisee at the expense of a disseisor; but, in its developed form, it had this result; and, in fact, we shall see that it benefited

[1] We have seen that the mediæval legislation as to fines had helped to obscure the connection of seisin with physical possession, vol. iii 241; but of course the effects of the statute of Uses in this direction were immensely greater.

[2] Vol. iv 438-442, 474-475; below 116 seqq., 156-159, 355.

[3] Cro. Eliza. 46-47.

[4] Geary v. Bearcroft Carter at p. 66.

[5] Cook v. Harris (1699) 1 Ld. Raym. at p. 367 *per* Holt, C.J.; Ryan v. Clark (1849) 14 Q.B. at p. 73 *per* Patteson, J.; Harrison v. Blackburn (1864) 17 C.B.N.S. at p. 691 *per* Erle, C.J.; cp. Hadfield's Case (1873) L.R. 8 Q.B. at p. 317.

him more substantially than he was benefited by all the other modifications put together.

In its original form the doctrine was applied to the case where A had wrongfully compelled B's tenant to pay to him (A) the rent to which B was rightfully entitled.[1] "If one holdeth of me," says Littleton,[2] "by rent service, which is a service in gross, and not by reason of my manor, and another that hath no right claimeth the rent, and receives and takes the same rent of my tenant by coercion of distress, or by other form, and disseiseth me by such taking of the rent; albeit such disseisor dieth so seised in taking of the rent, yet after his death I may well distrain the tenant for the rent which was behind before the decease of the disseisor, and also after his decease. [*And the cause is, for that such disseisor is not my disseisor, but at my election and will.*] For albeit he taketh the rent of my tenant, yet I may at all times distrain my tenant for the rent behind. . . . For the payment of my tenant to another, to whom he ought not to pay, is no disseisin to me, *nor shall oust me of my rent without my will and election.* For although I may have an assize against such pernor, yet this is at my election, whether I will take him as my disseisor or no. . . . And, in this case, if, after the distress of him which so wrongfully took the rent, I grant by my deed the service to another, and the tenant attorn, this is good enough, and the services by such grant and attornment are presently in the grantee."

As we can see from this passage, the difficulty was caused by the two very different points of view from which such things as rents in gross could be regarded. The prevailing mediæval tendency was, as we have seen,[3] to regard them as things, capable of being granted as corporeal things were granted, and susceptible of seisin or disseisin. They could be so regarded in Littleton's day. The person entitled to the rent could, if he pleased, consider himself disseised of the rent, and so could bring the assize against the man who had wrongfully compelled his tenant to pay to him. On the other hand, the tenant was under a personal obligation to pay the rent to the lord of whom he held it; and, as the idea of a personal obligation became familiar to the common lawyers, it came to be seen, as this passage from Littleton shows, that the mere fact that the tenant has paid his rent to the wrong man (whether under pressure of coercion or not) does not discharge his obligation to pay to the right man. Therefore the landlord had the option, either to treat the rent as a thing of which he had been disseised, and bring the assize against the

[1] Pollock and Wright, Possession 88-89. [2] §§ 588, 589.
[3] Vol. ii 355, 380; vol. iii 97-101.

disseisor, who had compelled the tenant to pay to him the rent due to the landlord; or to treat the rent as a personal obligation of the tenant, and to sue him for rent due and unpaid. If he likes to regard the rent as a thing, he can complain of a disseisin and bring a real action against the disseisor: if he likes to regard it as a personal obligation, he can elect to waive the remedy for disseisin and sue the tenant. He would naturally adopt the former course if he wished to get damages against the wrongdoer, or to establish his title to the rent. He would naturally adopt the latter course, if he aimed at simply getting payment of the rent from his tenant. This seems to have been the original scope of the doctrine of disseisin at election; and it continued to be one of its most ordinary and useful applications. As Blackstone says,[1] "all disseisins of hereditaments incorporeal are only so at the election and choice of the party injured; if, for the sake of more easily trying the right, he is pleased to suppose himself disseised."

In the course of the sixteenth and seventeenth centuries the doctrine was extended to corporeal hereditaments. This extension was based, in the first instance, upon a consideration of the position of the disseisor and the disseisee in special cases; and, later, upon a consideration of their intentions.

We can distinguish two classes of cases, in which a consideration of the position of the disseisor and disseisee, produced an extension of the doctrine of disseisin at election to corporeal hereditaments. The first class of these cases turns upon the personal position of the parties; and the second upon the distinctions between freehold and copyhold tenure, and between freehold interests and estates for years.

(*a*) Littleton puts a case, which rests upon an idea analogous to that upon which the doctrine of disseisin at election eventually came to rest. A man dies leaving two sons. The younger enters and dies leaving issue. The issue enters. In spite of the descent cast, the elder can enter upon the issue.[2] The historical origin of this rule was probably procedural. As Coke points out, the assize of mort d'ancestor did not lie as between brothers or

[1] Comm. iii 170.

[2] "Also if a man seised of certain land in fee have issue two sons, and die seised, and the younger son enter by abatement into the land, and hath issue, and dieth seised thereof, and the land descend to his issue, and the issue enters into the lands; in this case the eldest son or his heir may enter by the law upon the issue of the younger son notwithstanding the descent, because that when the younger son abated into the land after the death of his father, before any entry made by the eldest son, the law intended that he entered claiming as heir to his father. And for that the eldest son that claims by the same title, that is to say, as heir to his father, he and his heirs may enter upon the issue of the younger son, notwithstanding the descent because they claim by the same title," Litt. § 396.

sisters;[1] and it was for that reason that the eldest son's right of entry was preserved. [But the rule obviously has, and is meant to have, a result similar to that of the doctrine of disseisin at election. Though the younger son has abated, and a descent is cast, the elder is put by this rule in the same position as if no descent had been cast; for he or his heirs can enter upon the abator or his heirs. It is true that it is only with respect to his right of entry, notwithstanding a descent cast, that his position is improved.] Till he has entered he is under all the disabilities of a disseisee. For all that, the rule seems to rest at bottom upon an idea similar in principle to that upon which the doctrine of disseisin at election rests. Just as a man disseised of a rent is treated as if he were not disseised, so a man disseised and deprived of his right of entry, is treated as having a right of entry. The position of the infant gave rise to another application of this principle. In the seventeenth century, it was seen that the fact that an infant could treat a conveyance made by himself as voidable at his option,[2] could easily be expressed in the terms of this doctrine. "If," it was said in *Blunden v. Baugh*, "an infant make a lease for years rendering rent, and the lessee enter, it is at the election of the infant to charge him in an assize, or to bring debt for the rent."[3] For this proposition there was authority in the Year Books;[4] though it is no more stated there in the terms of the doctrine of disseisin at election, than the rule as to an elder son's right of entry is stated by Littleton. But, as the quotation from *Blunden v. Baugh* shows, it could be stated quite easily and correctly in the terms of this doctrine; and this method of statement came naturally to the lawyers of a period in which the land law was still a principal part of the common law. Now that the doctrine of disseisin at election is obsolete, modern lawyers state the same proposition more simply and more generally, when they say that the conveyances of an infant are as a rule voidable when he attains his majority.

(*b*) Historically, the most important class of cases in which this doctrine was extended is that which depends upon the distinctions between freehold and copyhold tenure, and between freehold interests and estates for years. We have seen that the distinction between freeholder, copyholder, and lessee for years, had necessitated a recognition of the fact that each of these three classes of persons had its own possession.[5] It might well happen that, if a freeholder had let his land to a copyholder or a lessee for years, the copyholder or the lessee for years might make a

[1] Co. Litt. f. 242a; vol. iii 184.
[2] Vol. iii 517.
[3] (1634) Cro. Car. at p. 303.
[4] Vol. iii 517 n. 6.
[5] Above 24-25.

conveyance, which the nature or extent of his estate did not entitle him to make, but with no intention of disseising the freeholder. In such a case the freeholder might either admit he was not disseised by continuing to treat the copyholder or lessee as his tenant, or he might elect to consider himself disseised by bringing the assize against the feoffee. Let us take one or two illustrations of the application of this principle.

A good illustration of the application of this principle to the activities of the copyholder is supplied by the case of *Streat v. Virrall*,[1] which was apparently a case of a lease made by a copyholder which was not warranted by the custom of the manor. In such a case the lord could elect, either to bring the assize against the lessee, thus choosing to consider himself disseised, or continue to treat the copyholder as his tenant and therefore liable for the rent and other services, thus choosing not to consider himself disseised. Illustrations of its application to the case of conveyances made or other acts done by a lessee are more numerous. In 1550[2] it was held that, "if a tenant for years surrender his estate to the lessor, and still continue in possession, always paying his rent to the lessor, this is no disseisin to the lessor, unless at his pleasure." "If," says Coke,[3] "a man maketh a lease at will and dieth, now is the will determined, and if the lessee continueth in possession he is tenant at sufferance, and yet the heir by admission (i.e. by election to consider himself disseised) may have an assize of mort d'ancestor against him." In the case of *Blunden v. Baugh*,[4] A, tenant in fee simple, allowed his son to occupy the land as tenant at will. The son leased the land for twenty-one years at a rent. It was held by a majority of the judges[5] that the making of the lease was not a disseisin of the father, but simply a disseisin at his election. "The party," it was said,[6] "to whom the lease is made doth not claim any freehold, but to have the lease only and to pay his rent, and pays the rent accordingly; so there was no intent in any of the parties to make a disseisin, thus the law shall not construe it to be a disseisin *partibus invitis*." This reasoning was obviously

[1] Cited in Blunden v. Baugh (1634) Cro. Car. at p. 304; the date of the case was 1621. In Cro. Car. this is spoken of as a common case of which Streat v. Virrall was simply one illustration.

[2] Pennington v. Morse Dyer 62a.

[3] Co. Litt. 57b.

[4] (1634) Cro. Car. 302.

[5] The judgment was only by a majority; in the Common Pleas Hutton and Vernon, JJ., Harvey, J., dissenting, had held that, on the facts, there was an actual disseisin; this decision was reversed in the King's Bench by Jones, Berkley, and Croke, JJ., Richardson, C.J., dissenting; but Croke appends a note to the effect that Heath, C.J., of the Common Pleas, Crawley, J., and Denham and Trevor, BB., agreed with the judgment of the King's Bench, "and conceived that it would be very mischievous if it should be adjudged otherwise."

[6] At p. 304.

as applicable to a lessee for life as to a lessee for years. "If," said Lord Mansfield,[1] "the lessee for life or years makes a feoffment, the lessor may still distrain for the rent . . . or bring an ejectment, and choose whether he will be considered as disseised."

It is clear from these cases that the doctrine is coming to be based more and more upon the intentions of the parties—presumed, implied, or expressed. This was a natural development. We have seen that the view was gaining ground that the intention of the parties to a conveyance should be regarded; and that this new view had led the courts to consider that even the most solemn conveyance might be avoided by fraud.[2] It led them also to emphasize the need for an intention to oust the freeholder of his freehold, in order to constitute a disseisin. Considerable stress was laid upon this principle in the case of *Blunden v. Baugh*.[3] "For as Co. Litt. 153b defines, 'a disseisin is when one enters intending to usurp the possession, and to oust another of his freehold,' and therefore *quærendum est a judice quo animo hoc fecerit*, why he entered and intruded."[4] As we have seen from the quotation made above from this case,[5] the stress laid on the intention of the parties harmonized with and supported the reasoning derived from the position of the parties—from the fact that the act done or conveyance made was done or made by a limited owner. Both their conduct and the nature of their interest united to show that they had no intention to disseise the freeholder; and therefore it was no disseisin of the freeholder except at his election.

This doctrine of disseisin at election was the most efficacious of all the modifications of the law designed to improve the position of the disseised owner. It was the most efficacious, because it affected more directly than any of these other modifications, the rights of the disseisor as against the disseisee. The other modifications of the law proceeded upon the principle of giving the disseisee extended rights to enter, or to take other measures to recover his seisin. They did not increase his powers of dealing with the property while still disseised. But this was exactly what the doctrine of disseisin at election did. A person who was only disseised at election was regarded as disseised for one purpose only—his right to bring the assize. He was not disseised for any other purpose.[6] Therefore, being seised, he had full rights of

[1] Taylor d. Atkyns v. Horde (1757) 1 Burr. at pp. 111-112.
[2] Above 32-34.
[3] (1634) Cro. Car. 302.
[4] At p. 303; this emphasis on the intent with which an entry is made is contained in the passage cited by Coke from Bracton f. 216b, above 27 n. 4.
[5] Above 40.
[6] "A man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself to the more easy and compendious remedy of an

dealing with the property. It was this consequence of the doctrine which made the determination of the question whether a man was actually disseised, or only disseised at election, of so much practical importance. Upon it might depend the validity of his dispositions, and therefore the title to the property of the persons in whose favour these dispositions had been made.

Let us take one or two illustrations from the cases. In the case of *Blunden v. Baugh*[1] the question, as we have seen, was whether the lease for twenty-one years by the son, who was tenant at will to his father, was a disseisin of the father, or only a disseisin at election. This was an important question because, after the lease, the father and the son had levied a fine, in order to effect a settlement of the property to the use of the heirs male of the son, and to the use that a jointure should be raised for the son's wife. If the effect of the lease by the son had been to disseise the father, the settlement would have been void, because he could not have thus dealt with the property while disseised. Since, however, the court held that there was no disseisin, but only a disseisin at election, "it follows that the freehold remains in the Earl of Nottingham (the father) until the fine levied by him and his son; and so the uses were raised, and the jointure well assured."[2] Similarly, it was held that if a man were only disseised at his election, and afterwards devised, the devise was good.[3] It would not have been good if he had been actually disseised, because he could not be said to "have" the land within the meaning of Henry VIII.'s statute of Wills.[4] So too, if a man were only disseised at election, the death of the so-called disseisor and the entry of his heir, would not prevent the so-called disseisee from entering.[5] Moreover, a disseisor at election could not, by feoffment fine or recovery, convey a tortious seisin, whereas an actual disseisor could. Thus, to take a case cited by Lord Mansfield in *Taylor v. Horde*,[6] "Tenant in tail of lands leased by his father to a second son for lives (under a power), upon his father's death received the rent from the occupier, as owner, and

assize of *novel disseisin*," Bl. Comm. iii 170-171; cf. Pollock and Wright, Possession 89. It followed that, "By disseisin at the election of the party is not to be understood an act which in itself is a disseisin, but which the party supposed to be disseised may, if he pleases, consider is *not* amounting to a disseisin: on the contrary, every act which is susceptible of being made a disseisin by election is no disseisin till the party in question, by his election makes it such," Butler n. 285 to Co. Litt. 330b.

[1] (1634) Cro. Car. 302. [2] At p. 304.

[3] Powseley v. Blackman (1623) Cro. Jac. 659; S.C. Palmer at p. 205, Dodderidge denied this, and said there must be new publication; and this was the law if there had been an actual disseisin, Bunter v. Coke (1708) 1 Salk. 237.

[4] See Maitland, Coll. Papers i 364, L.Q.R. ii 484-485; and cf. Bunter v. Coke (1708) 1 Salk. 237; below 48 n. 4, 365.

[5] See a case of 1572 cited in Taylor d. Atkyns v. Horde (1757) 1 Burr. at p. 112.

[6] At p. 111-112.

as if no such lease had been made, during his whole life. He suffered a common recovery." Now if he was an actual disseisor, he could do this, because he would be the tenant seised of a tortious freehold estate in possession. If he was not an actual disseisor the recovery was bad, because he was not seised of a freehold estate in possession—the person so seised being in that case the lessee for lives. "It was holden that this was only a disseisin of the freehold at election; and that therefore he could not make a good tenant to the praecipe: and the recovery was adjudged bad."

The doctrine of disseisin at election thus gave to a person, who might otherwise have been reckoned a disseisee, the powers of the person seised, and took away these powers from a person who might otherwise have been reckoned a disseisor, and so seised. Therefore its effect was to give a recognition, which was not given by the older law, or by any of the modifications of that law, to the rights of owners not actually seised or possessed. It was the recognition of the rights of ownership secured by this doctrine which caused Lord Mansfield to exclaim, "If it was not for this doctrine of election, what a condition would men be in!"[1] It was his desire to extend the efficacy of this doctrine, which led him to propound those heresies as to the nature of seisin and disseisin, which have made the case of *Taylor v. Horde* famous.

Departing from the older definitions of seisin and disseisin, and relying on the continental learning of feuds which the books of Spelman and Wright[2] had popularized in England, Lord Mansfield gave a new meaning to these terms. "Seisin," he said,[3] "is a technical term to denote the completion of that investiture by which the tenant was admitted into the tenure; and without which no freehold could be constituted or pass. . . . Disseisin therefore must mean some way or other of turning the tenant out of his tenure, and usurping his place and feudal relation." It followed that there could be no disseisin, such as would give a disseisor a tortious fee, unless there was not only a dispossession, but also a displacement of the tenant from his position as tenant, and a substitution of the disseisor in his place. A feoffment by a disseisor had, he suggested, this result in the old days by reason of the solemnities by which it was accompanied. "No tenant could alien without licence of the lord. When the lord consented the only form of conveyance was by feoffment publicly made, coram paribus curiae, with the lord's concurrence. Homage or fealty

[1] Taylor d. Atkyns v. Horde (1757) 1 Burr. at p. 113.
[2] Vol. v 19-20.
[3] 1 Burr. at p. 107; for this proposition he quoted Consuetudines Feudorum 1. 25; 2. 1; 2 Craig lib. 2, tit. 2.

was solemnly sworn; and suit of court and services were frequently done."[1] But when these solemnities became obsolete, a feoffment ceased to have this result. It ceased therefore to convey a tortious fee to the alienee. The true owner could therefore always enter upon such an alienee or his heirs. It was a case not of a true disseisin, but of a disseisin at election.

This reasoning was accepted by some of the judges.[2] It was on the face of it reasonable, and it could base itself on the fashionable foreign learning of feuds. It had the desired result of restricting the powers of a disseisor, and enlarging the rights of the true owner—a result towards which both the Legislature and the legal doctrine of the last three centuries had gradually been tending. Its one weak point was that it could be proved not to be English law. Butler's famous refutation, in which is contained one of the best accounts that we have of the doctrines of seisin and disseisin, is decisive;[3] and it has been accepted as decisive by all the famous conveyancers of the eighteenth and nineteenth centuries.[4] In spite of the adhesion of some of the judges in later cases to Lord Mansfield's theory, Lord Redesdale doubted its validity;[5] and Maitland has proved its historical worthlessness.[6] In fact, this attempt of Lord Mansfield to rationalize the law by a side wind, is very characteristic of the strength and weakness of his intellect and his intellectual equipment.

Lord Mansfield was a Scotchman by birth, but he was educated at Westminster and Oxford, and he was a barrister of Lincoln's Inn. He had kept up some connection with Scotland

[1] 1 Burr. at p. 107.

[2] In the later case of Doe d. Atkyns v. Horde (1777) 2 Cowp. at p. 703, Aston, J., delivering the opinion of himself, Willes and Ashhurst, JJ., said, "Tenant for years forfeited his estate by altering the possession; and on account of such possession and the notoriousness of the act of investiture, the feoffee ousted the reversioner. It was a translation of the feud from one man to another. But there was no idea of such a change being worked by a private secret contract of the parties; because that would make it difficult for the lord to know with whom the estate was lodged, and for strangers to bring their action. . . . The particular requisites of this form of conveyance (feoffment) have dwindled away; they have, from having been the only conveyance of land for a long series of years, languished into a mere form, and are nothing more than a common conveyance. Their grandeur and efficacy is lost"; cp. William v. Thomas (1810) 12 East at pp. 152-153, 155, *per* Lord Ellenborough, C.J., and Bayley, J.; Doe d. Maddock v. Lynes (1824) 3 B and C at p. 406 *per* Holroyd, J.

[3] Butler, note 285 to Co. Litt. 330b.

[4] See Lightwood, Possession of Land 43, 51-52; Challis, Real Property (3rd ed.) 405-406; Maitland, the Mystery of Seisin, Coll. Papers i 371 n. 1, L.Q.R. ii 488 n. 3.

[5] "I can only say, that as far as I have been able to investigate the subject, the law of feuds, strictly speaking, never was the law of this country; and a great deal of the argument which will be found in modern cases, and which is not to be found in more ancient cases, I think is founded in mistake," Cholmondeley v. Clinton (1821) 4 Bligh at p. 107.

[6] Coll. Papers i 358-384, L.Q.R. ii 481 seqq.

and Scotch law, so that both his birth and his education, as well as the qualities of his mind, tended to make him a jurist, learned in Roman and continental law as well as in English law. The breadth of his learning prevented him from attaining that accurate knowledge of the development of common law rules, which could only come to an English lawyer who had devoted the largest part of his time to the study of its complex technicalities. He approached the common law from the view-point of a student of the broad principles of jurisprudence, not from the view-point of a student of the evolution of its rules. These qualities of his mind fitted him admirably for the work of creating and settling the Law Merchant, which in England was in a backward and unsettled state.[1] They enabled him also to rationalize and liberalize other branches of the common law, notably quasi-contract,[2] and estoppel,[3] by an infusion of broad and equitable principles. But, naturally, the continued exercise of these qualities tended to make him think that he could settle on rational principles all the branches of the common law. This was a mistake. The principles of some of the older branches of that law were too well settled to be thus reformed. The ground was covered by authority; and the authorities could be understood aright only by lawyers who had studied their history and development. An attempt to rationalize these branches of the common law by the help of pure reason and foreign analogies could not succeed, because the principles founded on this basis could be proved to be contrary to ascertained principles of the common law. Thus Lord Mansfield's attempts to recast the doctrine of consideration,[4] to restate the rule in *Shelley's Case*,[5] and to make the court of King's Bench a court of equity as well as a court of law,[6] met the same fate as this attempt to extend the doctrine of disseisin at election.

But, though his views as to the nature of seisin and disseisin were not law, it must be admitted that the manner in which he supported them by means of the continental learning of feuds, and used them to extend the doctrine of disseisin at election, was extremely skilful. An extension of this doctrine on these lines would have greatly strengthened the tendency to favour the disseised owner at the expense of the disseisor;[7] and it would have helped forward those new ideas as to ownership and possession to which, as we shall see,[8] the working of the action of ejectment was giving birth. But the mediæval principles, which favoured the disseisor, were too deeply rooted in the common law, and too

[1] Vol. vi 522; vol. viii 298.
[2] Vol. viii 97.
[3] Chap. vii § 1.
[4] Vol. viii 25-34.
[5] Vol. iii 109-110.
[6] Vol. i 467; above 19-20.
[7] Above 41-42.
[8] Below 57 seqq.

well settled, to make it possible to change them by judicial decision. No doubt the tendency of legal development was then, and had been for some centuries, in favour of the disseisee;[1] and that tendency had strengthened the idea that seisin was connected with and connoted title. But, for the most part, this tendency had manifested itself in a series of exceptions to the general rule of the common law, which gave all the advantages of ownership to the person seised, and none or almost none to the person disseised. As we shall now see, the general rule retained so much of its vitality that it operated to lessen the effect of some of these modifications which have just been described; and it was even given a further emphasis in one or two respects by the Legislature.

(2) The rights of the disseisor and the disabilities of the disseisee.

In spite of all these modifications in favour of the disseisee, the law of this period still retained in substance the principles of the thirteenth century, as to the effects of the acquisition and loss of seisin upon the rights of the disseisor and the disabilities of the disseisee. The rights of the disseisor had not, and never have been modified as against third parties who can show no better right;[2] and though, as against the disseisee, they had been modified in various ways, the mediæval principles limited the effect of some of these modifications, and in some respects they had even been strengthened by the Legislature. Let us examine the law of this period upon this topic from these three points of view.

(i) *The survival of the mediæval principles as to the rights of the disseisor and the disabilities of the disseisee.*

I have already described the position of the disseisor and the disseisee in the mediæval common law.[3] It is clear that, throughout this period, and indeed until the law reforms of the nineteenth century, their relative positions were not materially changed. The following illustrations of the rights of a disseisor and the disabilities of a disseisee will make this clear:—

A disseisor gained a tortious fee simple.[4] It is a fee simple because he cannot qualify his own wrong;[5] and, having a fee simple, he could convey it or create estates out of it, which would disable the owner, when he recovered his property, from bringing trespass against the alienees of the disseisor (as he might have done against the disseisor himself) because such alienees had come in

[1] Above 31 seqq.
[2] Above 28.
[3] Vol. iii 91-92.
[4] Litt. § 611.
[5] "If a man entreth into land of his own wrong, and take the profits, his words, to hold it at the will of the owner, cannot qualify his wrong," Co. Litt. 271a.

by title.[1] It is true that, in the seventeenth century, the greater attention which was being paid to the intent of the parties,[2] led the courts to rule that it might be shown that the entry was no disseisin, but was made only with intent to claim some particular estate—e.g. a term of years.[3] Thus, in the *Mayor of Norwich v. Johnson*,[4] it was held that where one died intestate possessed of a term, and the defendant entered wrongfully and committed waste, he was not a disseisor, but an executor de son tort, and could be sued as such. But it is probable that this was new law.[5] There was authority to show that, in the sixteenth century, the court construed facts, similar to these proved in the *Mayor of Norwich v. Johnson*, to be a disseisin;[6] and that, consequently, the whole fee simple was vested in the defendant. However that may be, it was still law that, while as a general rule a disseisor got the whole fee simple, the disseisee had no estate at all, but merely a right of entry or action.[7] Hence the disseisor, having a fee simple, could alienate or devise or carve smaller estates out of his tortious fee.[8] The disseisee, on the other hand, having no estate, could not lease or otherwise alienate.[9] He could not make livery of seisin which he had not got;[10] and, if he

[1] "If one disseises me, and during the disseisin he cuts down the trees or grass or corn growing upon the land, and afterwards I re-enter, I shall have action of trespass against him *vi et armis*, for the trees, grass, corn, etc.; for after my regress, the law, as to the disseisor and his servants supposes the freehold always continued in me; but if my disseisor makes a feoffment in fee, gift in tail, lease for life or years, etc., and afterwards I re-enter, I shall not have trespass *vi et armis* against those who came in by title," Liford's Case (1615) 11 Co. Rep. at f. 51a; but it was settled in this case (after some diversity of opinion) that the disseisor, after his re-entry, was entitled to the corn, grass, etc., on the land, and could recover them or their value from anyone who had got possession of them, ibid at f. 52b.

[2] Above 32-34, 41.

[3] "If a stranger enter and pay no rent, he is a disseisor; *aliter* if he pay rent for thereby he shows the intent of his entry," Mayor of Norwich v. Johnson (1681) 3 Lev. 35 *per* Vaughan, C.J.

[4] (1681) 3 Lev. 35.

[5] The Y.BB. cited for the decision arrived at by the court in this case have very little bearing upon it; they turn on the proper remedy against a guardian who had usurped a guardianship to which he was not entitled; the question was whether a writ of waste lay, or a writ of trespass; if waste lay, it amounted to regarding the guardian as a lessee and not as a trespasser, and this was the view taken in Y.B. 32 Hy. VI. Mich. pl. 10 p. 7 *per* Littleton; S.C. Brooke Ab. *Waste* pl. 135; if trespass or an assize lay, he must be regarded as a trespasser, and this view was taken in 28 Ass. pl. 11.

[6] "M. 43 and 44 Eliza. pl. 12 in C.B. it was agreed by Walmesly and all the Court, that if a termor die, and a stranger claiming as executor enter upon the land, he is a disseisor, and cannot qualify his entry and wrong; and further, although he get the lease and sell it as executor, he is not executor of his own wrong, nor does his tortious disseisin qualify," Dyer 134b.

[7] Vol. iii 92.

[8] Ibid 91-92; Blunden v. Baugh (1632) Cro. Car. at pp. 304-305 cited above, 28 n. 11; Co., Second Instit. 413.

[9] Taylor d. Atkyns v. Horde (1757) 1 Burr. at p. 112; cf. Co. Litt. 48b.

[10] Perkins, Profitable Book § 220—"without a possession a man cannot make livery of seisin, etc."

attempted to make a conveyance in any other way, such an attempt not only did not affect the tortious fee of the disseisor, but might even seriously affect his own rights to recover the land.[1] If, for instance, he tried to alienate by fine the results were peculiarly disastrous to himself. He, in the face of his own fine, could not claim the land; the conusee could not enter because the fine was inoperative to transfer the conusor's rights;[2] and therefore the disseisor got an indefeasible title.[3] Similarly he could not devise;[4] and his right of entry or action could not be treated by his creditors as assets till he had regained seisin.[5] The widow of a disseisor was entitled to dower out of the land which he had gained by disseisin;[6] the widow of a disseisee was not entitled to dower from the lands of which her husband had been disseised.[7] A disseisor, being seised, could take a release or a confirmation from the disseisee;[8] but a disseisee could not take by either of these two forms of conveyance because he was not seised.[9]

These few illustrations will show that the mediæval principle was still the governing rule. We shall now see that this fact operated to limit the operation of some of those modifications of this mediæval principle which I have just described.

(ii) *The manner in which the modifications of the mediæval principle were limited.*

Three of these limitations may be noted.

Firstly, we have seen that certain statutes of Henry VII.'s and

[1] "This ancient manner of conveyance by feoffment and livery of seisin doth for many respects exceed all other conveyances. For if the feoffor be out of possession neither fine, recovery, indenture of bargain and sale inrolled, nor other conveyance, doth avoid an estate by wrong, and reduce clearly the estate of the feoffee, and make a perfect tenant of the freehold, but only livery of seisin upon the land: the other conveyances being made off from the ground, do sometimes more hurt than good when the feoffor is out of possession," Co. Litt. § 49a.

[2] The party who levies the fine is the conusor, and the party in whose favour it is levied is the conusee, vol. iii 237.

[3] Buckler's Case (1597) 2 Co. Rep. at f. 56a; this rule was denied by Bramston and Croke, JJ., in Fitzherbert v. Fitzherbert (1638) Cro. Car. at p. 484; but the better opinion is that the rule is as stated by Coke, see the cases cited *arg.* in William v. Thomas (1810) 12 East at pp. 153-154.

[4] Butler and Baker's Case (1591) 3 Co. Rep. at f. 32a; Goodright v. Forrester (1807) 8 East 552, at pp. 566-567; Maitland, L.Q.R. ii 484-485, Coll. Papers i 264-265; above 42 and n. 4; below 365.

[5] "And it is to be observed that a right (without any estate in possession reversion or remainder) for which good remedy by action is given, is not yet assets, until it be recovered and reduced into possession," Brediman's Case (1607) 6 Co. Rep. at ff. 58a, 58b.

[6] Perkins, Profitable Book § 426. [7] Co. Litt. 31a. [8] Ibid 296b, 297a.

[9] Ibid 267a—"A release of a right to one that hath but a bare right regularly is void; for as Littleton hath before said, he to whom a release is made of a bare right in lands and tenements must have either a freehold in deed or in law in possession, or a state in remainder or reversion in fee, or fee tail, or for life"; that he could not take by a confirmation follows from Coke's definition of a confirmation—"a conveyance of an estate or right in esse whereby a *voidable estate* is made sure and unavoidable, or whereby a particular estate is increased," Co. Litt. 295b.

VIII.'s reigns had been passed to prevent a conveyance by certain limited owners operating as a discontinuance. We have seen that one of these statutes had diminished the power of a descent cast to produce such a discontinuance, by enacting that a descent cast should not take away a disseisee's right of entry, unless the disseisor had had peaceable possession for five years after the disseisin, without entry effected or continual claim made.[1] But Coke tells us that the opinion of some was that, this statute being penal, it did not extend to abators and intruders;[2] and that it certainly did not extend to the feoffee of a disseisor.[3] Obviously such an interpretation very considerably limited the efficacy of the statute to protect the disseisee's right of entry.

Secondly, we have seen that the lord could treat the disseisee as his tenant, and thus entitle himself to an escheat if he died without heirs, or to the wardship of his infant child.[4] But he could, if he pleased, accept the disseisor as his tenant;[5] and, as against the feoffee or heir of a disseisor, he had no option. They were in by title; and, therefore, after a feoffment or descent cast, the lord must accept them as his tenants, and could not claim an escheat if the disseisee died without heirs.[6]

Thirdly, though Acts of 1541-1542 and 1551-1552[7] had, in the case of a conviction for treason, reversed the rule of the common law that a right of action could not be forfeited, the Acts were restrictively construed. It was held they did not give the king either a bare right of action enforceable only by writ of right, writ of formedon, or writ of entry;[8] or the benefit of a condition, by the performance of which the person convicted of treason might have entitled himself to an estate, provided that the condition was purely personal.[9] And it would seem that a forfeiture incurred for any other cause, e.g. outlawry, would have no effect upon the rights of a disseisee.[10]

[1] 32 Henry VIII. c. 33; above 32.

[2] "And it is said that abators and intruders are out of this statute, because the statute is penal, and extends only to a disseisor," Co. Litt. 238a.

[3] "The feoffee of a disseisor is out of the said statute and remains as at common law," ibid.

[4] Above 34-35.

[5] Co. Litt. 268a.

[6] "If the disseisor make a feoffment in fee, or die seised, and after the disseisee die without heir, then there is no escheat at all, because the lord hath a tenant in by title," ibid 268b.

[7] 33 Henry VIII. c. 20 §§ 3 and 4; 5, 6 Edward VI. c. 11 § 6; above 35.

[8] Marquis of Winchester's Case (1583) 3 Co. Rep. at f. 2b; Hale, P.C. i 242—though, as Hale notes, certain cases showed a tendency to put a restrictive interpretation on this rule.

[9] Hale, P.C. i 244-247; below 177-180; thus a condition of re-entry in favour of a mortgagor in a mortgage of lands in fee simple is not purely personal; and, therefore, if the mortgagor commits treason, the king gets the benefit of it, and is also entitled to the equity of redemption, Atty.-Gen. v. Crofts (1708) 4 Bro. P.C. 136.

[10] "If a man be disseised and after outlawed he shall not forfeit the profits of the land," Beverley's Case (1587) Golds. 55 pl. 8 *per* Walmesley *arg.*

Both the survival of the mediæval principle as to the relative positions of disseisor and disseisee, and the manner in which the survival of that mediæval principle restricted some of the later modifications of its effects, make it quite clear that, of all these modifications, the most effective was the extension of the doctrine of disseisin at election.[1] It was the most effective because, as we have seen, it in substance gave the advantages of seisin in certain cases to persons who were not in fact actually possessed, and who, but for this doctrine, must have been accounted disseisees. This effect of the doctrine of disseisin at election is, as we shall now see, very clearly brought out by the legislation of the sixteenth and seventeenth centuries, which strengthened the position of the disseisor at the expense of the disseisee.

(iii) *The statutes which strengthened the position of the disseisor at the expense of the disseisee.*

Under this head comes, firstly, a statute of 1540 prohibiting the sale of lands by owners out of possession; and, secondly, Henry VII.'s statute of Fines, and Henry VIII.'s and James I.'s statutes of limitation.

We have seen that a statute of 1540[2] penalized the buying and selling of any pretended titles to lands tenements or hereditaments, unless the vendors had been seised or possessed of an estate in possession in the land, or of an estate in reversion or remainder, or had taken the rents and profits, for a year before the sale. The object of the statute was the suppression of such offences as maintenance embracery and champerty;[3] but it clearly tended to strengthen the old idea that a man who is not seised cannot alienate. It therefore tended to weaken the position of a disseisee, because it prohibited him from making any attempt to alienate.[4] In fact, the extraordinary prevalence of maintenance and kindred offences, at the latter part of the mediæval period,[5]

[1] Above 86 seqq.

[2] 32 Henry VIII. c. 9 § 2; vol. iv 521; above 10-11.

[3] "Now since Littleton wrote, there is a notable Statute made in suppression of the causes of unlawful maintenance, which is the most dangerous enemy that justice hath," Co. Litt. 369a; cp. Partridge v. Strange (1553) Plowden at p. 87; for a modern exposition of the statute see Doe d. Williams v. Evans (1845) 1 C.B. 717; for the modification of this statute effected by 8, 9 Victoria c. 106 § 6, which allows the conveyance of a right of entry, see Jenkins v. Jones (1882) 9 Q.B.D. 128.

[4] This is clear from Coke's exposition of the statute; he says, Co. Litt. 369a, that a right may be pretenced, "When it is a good right or title in verity, and made pretenced by the act of the party . . . for example, If A be lawful owner of land, and is in possession, B that hath no right thereunto, granteth to or contracteth for the land with another, the grantor and grantee (albeit the grant be merely void) are within the danger of the statute. For B hath no right at all, but only in pretence. If A be disseised in this case, A hath a good lawful right, yet, if A, being out of possession, granteth to or contracteth for the land with another, he hath now made his good right of entry pretenced within the statute, and both the grantor and grantee within the danger thereof. *A fortiori* ot a right of action, *quod nota.*"

[5] Vol. ii 416, 452; vol. iii 395-400.

led both the judges and the Legislature to strengthen any set of principles which would tend to suppress them; and to base these principles on this need. We shall see that, just as the judges and the Legislature set their faces against the attempts by owners out of possession to alienate because it facilitated maintenance, so the judges assigned this same reason for their refusal to allow the assignment of a chose in action.[1] We shall see that this refusal to allow the assignment of choses in action originated, partly at any rate, from the personal character of the obligation,[2] just as the disability of the disseisee to alienate originated from the notion that a man cannot transfer what he has not got.[3] But, in both cases, the peculiar form which the lawlessness of the fifteenth century took, led the judges of that and later centuries to assign as their reason for both these rules the need to suppress maintenance and kindred offences. Their statement of the law has naturally led later lawyers to misapprehend the true historical origin of both these rules, and probably to give them a longer life than they would otherwise have had.

Secondly, Henry VII.'s statute of Fines, and the statutes of limitation of Henry VIII.'s and James I.'s reigns, very directly increased the powers of a disseisor at the expense of a disseisee. Henry VII.'s statute of Fines made a fine levied with proclamations a bar to adverse claims within five years; but with the proviso that persons who had estates in remainder or reversion, and persons under certain specified disabilities, should have a further period of five years, after their estates vested or their disabilities terminated. Thus if a disseisor levied a fine under the conditions prescribed by the statute, the person in whose favour the fine was levied would, after five years, get an indefeasible title as against the disseisee.[4] We have seen that Henry VIII.'s statute of limitation[5] fixed certain periods of limitation for different classes of real actions, and that those who did not sue within the periods fixed by the Act were barred from asserting their right by action. We have seen, too, that James I.'s statute[6] barred also an owner's right of entry if it was not asserted within twenty years after the right to make the entry accrued.[7] Thus, after the

[1] Below 523-527. [2] Below 520 and n. 5.

[3] Mountague, C.J., in Partridge v. Strange (1553) Plowden 77, had some perception of this fact when he said, at p. 88, "The common law before this statute was that he who was out of possession might not bargain grant or let his right or title, and if he had done it it should have been void. Then all that the statute has done is, it has added a greater penalty to that which was contrary to the common law before."

[4] 4 Henry VII. c. 24; vol. iii 244; it was held in Hunt v. Burn (1702) 2 Salk. 422 that this statute, unlike the statutes of limitations which only barred the remedy, below n. 7, 351, barred also the right; vol. iii 244 n. 4; cp. Bl. Comm. ii 354.

[5] 32 Henry VIII. c. 2; vol. iv 484-485. [6] 21 James I. c. 2; vol. iv 485-486.

[7] But his right of entry only, not his title; thus it was held in Doe d. Burrough v. Reade (1807) 8 East 353, that, where A, whose right of entry had been barred by the

lapse of the twenty years fixed by the Act of James I., the disseisee lost his right of entry (if he had not previously lost it by a descent cast or a discontinuance); and by Henry VIII.'s Act, after thirty years, he lost his right to sue by writ of entry, and after sixty years his right to sue by writ of right.[1] The disseisee then got an indefeasible title, because he was seised, and no one could assert a better right to seisin.[2]

But it should be noted that neither Henry VII.'s statute of Fines, nor the statutes of limitation, had any application to the man who was not actually disseised. Therefore they did not apply to the person who was only disseised at election. If a person was only disseised at election, the so-called disseisor was not actually seised; and, therefore, if he tried to levy a fine, the so-called disseisee could upset the fine by proving that he had no seisin. Similarly, the statutes of limitation would not run against a disseisee at election merely, as he was still actually seised.[3] We shall see that an application of this doctrine of disseisin at election, to settle the question of the circumstances under which a possession, in fact enjoyed by another person, would be sufficient to cause the statutes of limitation to run in his favour, gave rise to the doctrine of adverse possession. With the growth of this doctrine, which arose in relation to the action of ejectment, I shall deal in my next section.[4] But before I deal with the effects of the rise of this action upon the law as to seisin possession and ownership, I must first endeavour to sum up the results of these modifications of the old doctrines of seisin and disseisin.

(3) The effects of these developments.

The effects of these developments upon the law as to seisin and disseisin, will be most clearly understood, if one or two illustrations are given of the results produced by them.

Suppose that A, a person having no interest in the land, wrongfully ousted B. A, as against all the world except B, was

fact that B had been in possession for twenty years, entered on the death of B, C, B's devisee, could not maintain ejectment against A, as he was in possession and was entitled.

[1] "If a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession* and the *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of *possession*; but I still retain the *actual* right, both of *possession* and *property*. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years," Bl. Comm. ii 198-199.

[2] Vol. iii 93-94.

[3] Above 41-42; notes to Taylor d. Atkyns v. Horde 2 S.L.C. (10th ed.) 634.

[4] Below 69-72.

regarded as and had the rights of an owner.[1] B had a right of entry, and could assert this right by an action. The form of his action would, in the Middle Ages, have varied according as B was a freeholder, a lessee for years, or a copyholder; but, in the sixteenth century, it could and generally would be in all cases an action of ejectment.[2] If B was the freeholder, and was therefore seised, he would have these rights of entry and action, whether A was an actual disseisor, or only a disseisor at election. But this distinction between actual disseisin and disseisin at election, is all important when the rights of persons who take from A come to be considered. If A was only a disseisor at election he gained no tortious seisin, and therefore he gained nothing which he could convey to another, or transmit to his heirs. B could therefore enter, not only on A, but also on his alienees or his heir.[3] If A or his alienees levied a fine, B could upset the fine by showing that none of the parties had any interest in the land;[4] and the statutes of limitation would not run against B.[5] But, if A was an actual disseisor, he had a seisin which he could convey by feoffment, fine, or recovery; and this seisin would descend to his heirs. It is true that B could generally enter upon A's alienees.[6] But, if A or his alienee levied a fine, B's rights would be barred in five years; and the fine was a bar, not only if B was seised of an estate in possession, but also if the land was let to a tenant for years or to a copyholder for life or years, provided that the acts done by the wrongdoer amounted both to a dispossession of the lessee and a disseisin of the lessor.[7] Moreover, both A and his alienees could acquire a title under the statute of limitation;[8] and if A died seised, and the land descended to his heir, B was deprived of his right of entry.[9] It is thus obvious that, in spite of the modifications made by the legislation of this period, successive disseisins might beget successive titles to the land, which might all be existing together. Obviously, if any of these disseisees had confirmed or released[10] their rights to any of the disseisors or their successors in title, matters became still more complicated.

Now let us take the case where A, a person having a limited

[1] Above 28. [2] Above 9. [3] Above 41-43.
[4] Above 52. [5] Above 52.
[6] Vol. ii 584-585; vol. iii 92-93; above 32.
[7] Margaret Podger's Case (1613) 10 Co. Rep. at f. 105b; if, on the other hand, freehold was let for life, the lessee was seised, and the wrongdoer's act could only disseise him; the landlord therefore had no immediate right of entry, as he had where he had leased for years or to a copyholder; and therefore it was held, on the construction of Henry VII.'s statute of Fines, that the landlord had five years after the death of the freeholder within which he could claim.
[8] Above 51-52; below 56.
[9] Vol. ii 585; above 21, 32. [10] Above 48.

interest in the land, conveys the land for an estate in fee simple to some third person. If A was a tenant for life, or some of those other limited owners who came within the provisions of Henry VIII.'s legislation, he could not, by his alienation, prevent the person entitled, after the expiry of his interest, from entering upon the alienee, either immediately or after the expiry of that limited interest.[1] But, none the less, if A's acts amounted to an actual disseisin, he got and could convey a tortious fee; and, if a fine was levied and five years passed, or if the period fixed by the statutes of limitation elapsed, the persons entitled after the expiry of A's estate might find that their rights of action were barred. It was, however, settled in the seventeenth century that, if a lessee, whether for life or years, disseised his landlord, and enfeoffed another, and that other levied a fine, the five years fixed by Henry VII.'s statute of Fines would not begin to run against the landlord till after the lease had expired.[2] It must be remembered too that, in spite of Henry VIII.'s legislation, the powers of a tenant in tail, to affect the rights of those entitled under the entail by a tortious feoffment, were still extensive. His powers lasted the longer—perhaps because they fell in with the desire of the lawyers to promote freedom of alienation.[3] However that may be, if a tenant in tail enfeoffed in fee simple, this feoffment would prevent the issue, remaindermen, or reversioners from entering upon the feoffee after the death of the tenant in tail. Their rights were discontinued, i.e. turned to a right of action to be asserted by writ of formedon;[4] and it might even happen that, by the operation of the doctrine of collateral warranty, they lost even this right. Thus if A, tenant in tail, enfeoffed B with warranty, and died without an heir of his body, so that the estate tail devolved on the remainderman, and the remainderman was A's heir general, the duty to warrant, which descended upon him as heir, prevented him from asserting his right to the estate tail.[5] Here again, therefore, there might be various titles co-existing to various interests in the same piece of land.

During this period, therefore, seisin could "beget proprietary rights," quite as easily as in the Middle Ages; and "at one and the same moment half a dozen possessory titles to the same piece of land—titles which are more or less valid—might be in exist-

[1] Above 32.

[2] Whaley v. Tankred (1572) Sir Th. Raym. 219; the tenant here was tenant for 99 years if he should so long live; this decision was not, as was pointed out in that case, contrary to the decision in Podger's Case, above 53 n. 7, since the former case referred to a disseisin by the tenant and a fine levied by his feoffee, not to a disseisin by a wrongdoer.

[3] Below 193. [4] Above 21, 52. [5] Vol. iii 118 and n. 1.

ence."[1] It is true that Henry VII.'s statute of Fines and the statutes of limitation had cut off some of the possibilities which were open in the Middle Ages. On the other hand, the infinitely greater facilities for creating complicated settlements, and the power to convey the legal estate by secret conveyances, which were the results of the statutes of Uses and Wills, introduced other possibilities which were unknown in the Middle Ages. To meet the results, which might otherwise have followed from those statutes, it was necessary to make it possible to avoid the fraudulent exercise of these extensive powers, and to elaborate and to lay stress upon the doctrine of disseisin at election. But, though these were necessary alleviations, they obviously did much to increase the complication and the obscurity of the law. Many difficult questions necessarily arose when the court was asked to say, in any given case, whether a set of limitations was voidable by reason of fraud; and the doctrine of disseisin at election obviously tended to obscure the law as to the true definition of a disseisin, and made it possible for Lord Mansfield, in the case of *Taylor v. Horde*, to attempt to revolutionize it.

Of these effects upon the law as to seisin and disseisin the facts of the case of *Taylor v. Horde*[2] are as good an example as any. They were as follows:—Sir Robert Atkyns was tenant for life of certain estates, remainder to his wife for life, remainder to his eldest son Robert in tail male; remainder to his grandson John Tracy, and his younger brothers, successively in tail; with an ultimate remainder to his nephew Richard Atkyns and his heirs. Sir Robert the father died, and his wife entered on the lands. There were certain attendant terms outstanding, which were held in trust for Robert the son. He wished to bar the entail; and, apparently, not being able to procure the assent of the widow who was the life tenant, got these terms assigned to himself, and successfully brought ejectment against the widow for possession of the land. So soon as he got possession under this judgment, the terms were surrendered to him (Jan. 1st, 1710). He then made a feoffment of these estates to James Earle and his heirs, in order that Earle might become tenant to the præcipe, and suffer a common recovery to the use of Robert and his heirs. This recovery was accordingly suffered, and Robert died the year after (1711) without issue and intestate, leaving Robert Atkyns, his nephew, his heir at law. In 1712 the widow of Sir Robert the father got a verdict in an action against Robert Atkyns, and

[1] P. and M. ii 102, cited vol. iii 244.

[2] (1757) 1 Burr. 60; excellent summaries of the facts will be found in Butler's note upon Co. Litt. § 611, and in Lightwood, Possession of Land 51-52; cf. also Challis, Real Property (3rd ed.) 405-406 note.

died in the same year. On her death, Robert Atkyns went into possession, and remained in possession till his death in 1753. He left two daughters Ann, the wife of Mr. Horde, and Elizabeth, the wife of Mr. Chamberlayne. Then, for the first time, the question was raised whether the recovery suffered by Robert Atkyns the son was valid? If it was, the two daughters were entitled to the estate: if it was not, on the death of the widow, John Tracy was entitled under the original entail. He brought an action of ejectment, and, after several arguments, it was held that the recovery was bad on the ground that the transaction between Robert Atkyns and Earle was covinous, and designed to enable him to bar the estate tail without the assent of the widow who was the tenant for life; but that the title of the plaintiff to recover was barred by the statute of limitation. This decision was affirmed by the House of Lords. Later, on the death of John Tracy and his brothers without issue, the heir at law of Richard Atkyns brought another action claiming under the original entail.[1] The heir at law of Richard Atkyns was not barred by the statutes of limitation, as his right only accrued on the failure of the issue of John Tracy and his brothers. He therefore recovered the estate on the ground that the recovery suffered by Robert Atkyns the son was covinous and therefore void.

The facts and the arguments in this case are a striking illustration of the complexity of the law as to seisin and disseisin. As we have seen,[2] the case is famous for Lord Mansfield's attempt to rationalize the law, by giving such a definition of disseisin as would have greatly diminished the number of cases in which an actual disseisin could occur, and therefore the number of cases in which a tortious fee simple could be created. But the unanimity with which the conveyancers have condemned Lord Mansfield's unhistorical speculations,[3] shows that both the mediæval principles upon which the law as to seisin and disseisin rested, and their modern developments and modifications, were then, and still are, well understood by specialists in the land law. Its complex rules could be and were applied in practice by experts. At the same time its defects were patent. It consisted of a set of primitive principles which had grown up round, and had been elaborated by, the working of the real actions; these primitive principles had been reconciled with more modern ideas only by the growth of a number of modifications, statutory and otherwise, which made the law difficult, obscure, and complex; and, even with these modifications, the primitive principles upon which it was based prevented it from recognizing and protecting adequately the rights of owners who were not seised. Moreover, as the law had grown

[1] (1777) 2 Cowper 689. [2] Above 43-44. [3] Above 44.

up round the real actions, it applied mainly to freehold, not to the whole of the land law. New principles were needed which would protect more adequately the rights of owners who were not seised, and would be applicable to the whole of the land law. These new principles were gradually evolved from the working of the actions of trespass quare clausum fregit and ejectment. Just as those actions borrowed some of their rules from the real actions which they had superseded,[1] so the rules as to ownership and possession, evolved from their working, borrowed some of the older principles of the law as to seisin and disseisin which had resulted from the working of the real actions. But they also introduced new ideas and more general principles; and thus our modern law has been evolved, partly from the older principles which had grown up round the real actions, and partly from these newer ideas and principles, which were evolved through the working of the actions which superseded them. To the evolution of these newer ideas and principles we must now turn.

The Effects of the rise of the Actions of Trespass and Ejectment

The working of the action of trespass and its off-shoots have, as we have seen, played a large part in the creation of our modern common law. The action of assumpsit has created our modern law of contract and quasi-contract;[2] the action of trover and conversion has created our modern law as to the possession and ownership of chattels personal;[3] and, similarly, the actions of trespass quare clausum fregit and ejectment have created a large part of our modern law as to the possession and ownership of interests in land. In all three cases the newer action almost superseded the older forms of action. Just as assumpsit superseded debt, and trover detinue, so trespass quare clausum fregit and ejectment superseded the real actions. But the new law as to ownership and possession of land, which grew up around the actions of trespass and ejectment, did not supersede the old law which had grown up round the real actions, as completely as the new law as to contracts and the ownership and possession of chattels, which grew up round the actions of assumpsit and trover, superseded old law which had grown up round the actions of debt and detinue. This was due mainly to two causes. Firstly, the law which had grown up round the real actions was a far fuller and more elaborate body of law than that which had grown up round the older personal actions; and, secondly, the real actions were not so completely superseded. As we have seen,

[1] Above 15-19. [2] Vol. iii 428 seqq.; vol. vi 639; vol. viii 42, 87-88, 88-97.
[3] Vol. iii 350-351; below 402, 447.

there were cases in which it was still necessary to have recourse to them.[1] Therefore, though we can discern the growth of the principles of our modern law as to the possession and ownership of land, the mediæval principles still survived; and, as I have said, the combination of modern and mediæval made the law of this period both obscure and complicated.

Both the actions of trespass quare clausum fregit and ejectment were general actions—that is any tenant, whether freeholder, copyholder, or lessee for years, and whatever his estate, could get relief by their means, if he proved the necessary facts.[2] Trespass quare clausum fregit was the action by which a tenant in possession could get damages for an unlawful disturbance of his possession. This form of the action of trespass had already begun to supersede the assize of novel disseisin in the mediæval period;[3] and in this period it became the universal means of redress for wrongs of this kind. Ejectment was the action by which a tenant out of possession asserted his right to possess as against the person in possession. If he succeeded in his action, he recovered the possession to which he had a right—"He who enters under it (a judgment in ejectment) in truth and in substance can only be possessed according to right, *prout lex postulat*. If he has a freehold, he is in as a freeholder. If he has a chattel interest, he is in as a termor, and, in respect of the freehold, his possession enures according to right. If he has no title he is in as a trespasser; and, without any re-entry by the true owner, is liable to account for the profits."[4] And, just as these actions were general, in that they lay for freeholder, copyholder, or lessee for years, so the conditions under which they lay were equally general. In trespass quare clausum fregit the plaintiff must show that he was physically possessed of the property, and that the defendant disturbed that possession. In ejectment he must show that he had a legal right to enter and take physical possession, which was not barred by Henry VII.'s statute of Fines or by the statutes of limitation. These actions therefore were very different from the various real actions, each of which was adapted to a particular case of disseisin, abatement, or wrongful entry, and in each of which the point at issue must be precisely defined by the pleadings.[5] No doubt the need to choose the form of real action

[1] Above 20-22.

[2] "An ejectment is a possessory action, in which almost all titles to land are tried: whether the party's title is to an estate in fee, fee tail, for life, or for years, the remedy is by one and the same action," Taylor d. Atkyns v. Horde (1757) 1 Burr. at p. 90 *per* Knowler *arg*.

[3] Vol. iii 27.

[4] Taylor d. Atkyns v. Horde (1757) 1 Burr. at p. 114 *per* Lord Mansfield, C.J.; above 7.

[5] Vol. ii 521; vol. iii 5-26; above 7.

appropriate to the disturbance of the possession complained of, and the precision of statement in the formulation of the action, had their advantages.[1] But, as we have seen, the defects of the real actions were so many and various that litigants welcomed the chance of making use of these more general forms of action.[2] For this reason it is in the conditions under which these actions lay, and their application to the complex rules of the land law, that the principles of the modern law as to the ownership and possession of land have originated.

The mediæval principle that seisin or possession was title as against all the world, except as against those who could show a better title, was a principle as well recognized in the action of trespass as in the assize of novel disseisin.[3] There is a complete agreement of the authorities on this point during this period. It is true that their exposition is sometimes somewhat obscure to us, because it is generally stated in terms of pleading;[4] but the root of the matter is there;[5] and it is the foundation of the decisions in those modern cases, which lay down in perfectly clear terms that mere possession is sufficient to enable a possessor to bring trespass against a wrongdoer.[6] As we shall see, exactly the same principle was applicable to the possession of chattels.[7] Whether mere possession was also sufficient to enable a possessor without title to sue a trespasser by action of ejectment, was not clearly settled till the nineteenth century;[8] but the better opinion was

[1] "The precision of the proceeding in real actions, when the matter in question was thoroughly canvassed in pleading, and reduced to a simple point before it was trusted to a jury, is thought to be ill changed for the present course, when the whole question is at once sent in the gross to trial upon the general issue, without any previous attempt to simplify or decide it with less circuity and expense," Reeves, H.E.L. iii 181.

[2] Above 8-9.

[3] Vol. iii 352-353; Y.B. 19 Ed. IV. Mich. pl. 5 *per* Choke, J.; it is true that he held that, if the king were entitled, a mere trespasser, though he could sue for the entry and breaking hedges or taking chattels, could not sue for "such things as arise from the land"; as to this exception, which was overruled later, see below nn. 5 and 8.

[4] See e.g. Fenner v. Fisher (1593) Popham 1.

[5] Thus it was quite clearly decided in Johnson v. Barret (1646) Aleyn 10 that "even an intruder upon the king's possession might have an action of trespass against a stranger"; this decision really overruled the distinction drawn in Y.B. 19 Ed. IV. Mich. pl. 5, and upheld in Anon. (1588) 4 Leo. 184; S.C. Godbolt 133; in the latter report it is said that Periam, C.J., doubted of this exception, and his doubt was justified by Johnson v. Barret, as Bayley, J., clearly explained in Harper v. Charlesworth (1825) 4 B. and C. at pp. 586-590.

[6] Cary v. Holt (1746) 2 Str. 1238; Harker v. Birbeak (1764) 3 Burr. at p. 1563; Graham v. Peat (1801) 1 East 243; it is pointed out by Radcliffe and Miles, Cases in Tort 289, that these cases really depend on the principle that, "possession obtained by force or fraud not acquiesced in, is not regarded as legal possession at all as against the party dispossessed"; as we have seen, above 32-34, this idea had already begun to emerge in the decisions as to the effects of fraud upon attempted conveyances.

[7] Below 449-450.

[8] Thus in Johnson v. Barret (1646) Aleyn 10 it is stated that though "an intruder upon the king's possession might have an action of trespass against a stranger," yet "he could not make a lease whereupon the lessee might maintain an ejectione firmæ";

that it was sufficient; and this is now the law.[1] We shall see that the same principle is applied to an action for the conversion of a chattel brought against a trespasser who has converted it.[2] Thus the mediæval principle that possession is ownership as against all the world, except as against those who can show a better title, having been maintained in law of this period, remains part of our modern law.[3] To take a concrete illustration, if a disseisor settles land on A for life with remainders over, the fact that the settlor is a disseisor will not enable A to claim the fee, merely because the disseisee's right is barred by the statute of limitation. The settlor's possession was good as against all the world except the disseisee, and therefore those claiming in remainder under the settlement have a better right to the fee than A, which right they can enforce by action.[4]

If, on the other hand, a disseised or dispossessed owner were suing a person in possession of his property, who had not got possession of it by a trespass committed against him, he must bring the action of ejectment; and to succeed in this action he must show a legal right to enter and take physical possession, which was not barred by Henry VII.'s statute of Fines or the statutes of limitation.[5] In other words, though possession is title as against those who can show no better title, any one who can show a better legal right to enter, which is not barred, can successfully sue the possessor. To state the law in this way would be substantially true to-day; and as true of chattels as of land.[6] It would also be a true statement of the law of this period, so far as the disseised or dispossessed owner's rights were regulated by the action of ejectment. But, during this period, it would not, for two reasons, be a wholly true statement as to the rights of such an owner. Firstly, we have seen that the action of ejectment

this is no doubt generally true, because the lessee must prove title in his lessor; and possibly the court meant to conclude (though the report does not say so) that a possessor without title could not sue a mere trespasser by action of ejectment, see next note; cp. Harper v. Charlesworth (1825) 4 B. and C. at p. 594 *per* Holroyd, J.

[1] This is perhaps the ratio decidendi of the obscure case of Allen v. Rivington (1670) 2 Wms. Saunders 111; in that case the plaintiff in ejectment had got possession, and the defendant ousted him, without (as the court found) any reason for so doing—in other words, the defendant was a mere trespasser; therefore it was said that the "privity of possession alone" gave the plaintiff a title; note that this reasoning was similar to that used in Fenner v. Fisher (1598) Popham 1, which was an action of trespass; so that it is possible that the court meant, as against trespassers, to rule that the same principle applied to ejectment as applied to trespass; but the case is obscure, and may possibly be also explainable on another ground, see below 62-63; the modern cases are quite clear, see Doe d. Hughes v. Dyball (1829) 3 Car. and P. 610; Davison v. Gent (1857) 1 H. and N. 744.

[2] Below 426.

[3] See Perry v. Clissold [1907] A.C. 73.

[4] Dalton v. Fitzgerald [1897] 2 Ch. 86, and Pollock and Wright, Possession 95, there cited.

[5] Below 69.

[6] Below 449-450.

had its limitations; and that, in theory at any rate, the owner, though unable to sue by ejectment because he had no right of entry, might yet be able to recover by some one of the real actions.[1] Secondly, the principles of the law of ownership and possession, which were evolved by this action, were, so to speak, born into an atmosphere permeated with those doctrines of seisin and disseisin which I have just discussed; and it was therefore inevitable that it should be influenced by some of them.[2] Therefore, although we can see, in the conditions under which the action of ejectment lay, the root principles of our modern law as to the rights of owners as against those who are in possession of their property, those principles were, during this period, obscured, partly by the survival of the older rules as to seisin and disseisin, and partly by newer rules which were suggested by them. The manner in which the new law was thus developed from and influenced by the old, will best be seen from an examination of the manner in which the courts interpreted the conditions needed for success in this action. It is only through such an examination that we can understand the complex principles which, at this period, regulated the rights of owners and possessors of the different interests in the land recognized by law. We shall see that, from the earlier cases which, in the latter part of the sixteenth and in the seventeenth centuries, began to settle the conditions under which the action lay, some general principles as to the ownership and possession of land gradually emerge in the eighteenth and nineteenth centuries. We shall see, too, that these principles, which were legal principles and applicable to legal estates, were in the main followed by equity and applied to equitable estates.

The plaintiff in an action of ejectment must show, firstly, that he had *a right* of entry; secondly, that he had a right of *entry;* thirdly, that this right of entry *was not barred;* and, fourthly, that he had a *legal* right of entry.

(1) The plaintiff must show that he had a *right* of entry. The plaintiff in ejectment is a person out of possession, who claims to have a better right to the property than the defendant in possession. Unless the defendant has got his possession by a trespass committed by him against the plaintiff, unless, in other words, he is a mere wrongdoer, the plaintiff must prove his right.[3] Prima facie the man in possession is the owner in fee simple.[4] This presumption was recognized in the Middle Ages—indeed it

[1] Above 20-22. [2] Below 68.
[3] Above 60 n. 1.
[4] Peaceable d. Uncle v. Watson (1811), 4 Taunt. at p. 17 *per* Mansfield, C.J.; Asher v. Whitlock (1865) L.R. 1 Q.B. at p. 6 *per* Mellor, J.

is at the root of the idea that the disseisor gets and can convey a tortious fee simple. It is for the plaintiff to disprove that presumption by showing that he has a right to get possession. This necessarily follows from the issue raised in the action—the title of the plaintiff's lessor to grant the lease by virtue of which the plaintiff seeks to recover possession. It was this principle which the court had in its mind when it laid down, in *Johnson v. Barret*, that an intruder "could not make a lease whereupon the lessee might maintain ejectione firmæ."[1] For if, in such a case, the lessee were ejected he could not prove any title in his lessor, and could not therefore recover. Thus we arrive at the rule that, "in this action, the plaintiff cannot recover, but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title. For possession gives the defendant a right against every man who cannot show a good title."[2]

The question now arises what sort of right must the plaintiff prove? Is it merely a better right than the defendant's, such as the demandant in a writ of right or writ of entry must prove as against the tenant? Or, must he prove a right good as against all the world? This is a very fundamental question, because, upon the answer to it depends the nature of the right asserted in this action, and, therefore, the nature of the ownership of land recognized by English law. If the plaintiff need only prove a better right than the defendant's, then, modern English law would, like the mediæval law, have continued to refuse to recognize anything like an abstract *dominium* or ownership which is good as against all the world.[3] It would only have recognized relatively good or relatively bad rights to possession. If, on the other hand, the plaintiff, in order to succeed in this action, must prove an absolute right, then it would be true to say that through this action the conception of an abstract *dominium* or ownership, which is good as against all the world, has come into modern English law.

It is, I think, probable that, for some time, English law hesitated between these two possible views as to the nature of the right which the plaintiff in this action must establish. Thus, it is possible that this may be the explanation of the case of *Allen v. Rivington*.[4] "It appeared upon the record that the lessor of

[1] Above 59 n. 8.

[2] Roe d. Haldane v. Harvey (1769), 4 Burr. at p. 2487 *per* Lord Mansfield, C.J.

[3] Vol. iii 89-91.

[4] (1670), 2 Wms. Saunders 111. As to this case see note to Doe v. Billyard (1828) 3 Man. and Ry. 112-113; I do not think it is true to say, as is said in that note, that the "prior possession of plaintiff seems to have been nothing more than the formal entry confessed by the defendant in the consent rule," as his lessor claimed an interest under the will of the testator, and had been in possession by virtue of that supposed interest,—that, it seems to me, was the prior possession referred to.

the plaintiff had a priority of possession, and there was not any title found for the defendant." In other words, it appeared on the record that, as against the defendant, the plaintiff could show an older and therefore a better possession, and so he ought to recover. If this is the right view of the decision, it would seem that the judges thought that the plaintiff in an action of ejectment could succeed if he established, not an absolute right, but merely a better right than the defendant. But, even before this case was decided, it is clear that English lawyers were beginning to grasp the more modern conception of ownership. Thus in *Liford's Case*[1] Coke says "*Quoad proprietatem* the regress of the disseisee revests the property in him. . . . as well against the feoffee lessee etc. and the second disseisor, as against the disseisor himself; for the act of my disseisor may alter my action, but his act cannot take away my action property or right." And, by Holt's time, the law had practically come to the conclusion that the plaintiff in ejectment must show an absolutely good right, not merely a right relatively better than that of the defendant. Salkeld's report of the case of *Stokes v. Berry*[2] runs as follows:—"If A has had possession of lands for twenty years without interruption, and then B gets possession, upon which A is put to his ejectment, though A is plaintiff, yet the possession of twenty years shall be a good title in him as if he had still been in possession. Ruled *per* Holt, C.J." The reason assigned in Lord Raymond's report is that he has acquired a possessory title under James I.'s statute of limitation, which barred the entry of adverse claimants in an action of ejectment; and in both reports an analogy from the old law as to seisin and disseisin is invoked, and the effect of the statute is compared to "a descent at common law which tolls the entry." Clearly the reason given for this decision involves the proposition that what the plaintiff in ejectment must prove is not merely an older and better right to possession than the defendant's, but a right which no other claimant can attack in such an action.[3]

[1] (1615), 11 Co. Rep. at f. 51b.

[2] (1699) 2 Salk. 421; S.C. 1 Ld. Raym. 741 *sub. nom.* Stocker v. Berney.

[3] Lightwood, Possession of Land 112, says, "Later authorities speak as though the plaintiff was bound to show not merely a right of possession but a right of property good against the world. Consequently he was liable to be defeated if by any means it appeared that the real title was in a third person. . . . If by 'real title' is meant the title of the true owner, these passages must be wrong; otherwise, how could the disseisor recover in ejectment against the disseisee after the entry of the latter was tolled?" I think the answer is that, *so far as the plaintiff's rights were governed by the action of ejectment*, he must show an absolute right to enter. It is true that, as long as the real actions lasted, and the old law of seisin and disseisin remained, a title acquired by a judgment in ejectment might be questioned by another form of action; yet it is also true that if a plaintiff wished to recover in ejectment he must show an absolute *right to enter*. When the real actions were abolished, and the older survivals—the discontinuances and descents cast—which denied a right of entry to a disseisee were removed, above 23, it became true to say that the plaintiff in

This was made perfectly clear by the decisions of the eighteenth and nineteenth centuries; and these decisions, by bringing out the consequences of the rule that the plaintiff must establish an absolute right in ejectment, have familiarized English law with the nature of the abstract right of ownership. If the plaintiff must establish an absolute right, it follows that he cannot recover in an action of ejectment, firstly, if his title depends on his possession alone, and he can only show a possession for a less period than the twenty years fixed by James I.'s statute of limitation; and, secondly, either (*a*) if the defendant can negative his title by proving that some third person is entitled; or a fortiori (*b*) if it appears from his own statement of his case that he has no right to the property which he is claiming, But, thirdly, it follows that he can recover in an action of ejectment, if he can show that he or his predecessors in title have been in possession for the period required by the existing statutes of limitation, and if his right to get possession is not barred by those statutes. Let us now turn to the cases and see how these principles have been applied.

(i) The fact that a plaintiff, who relies solely on his own possession, must show a possession for twenty years—the period fixed by James I.'s statute of limitation—seems clearly to involve the consequence that possession for any less period will not do. We have seen that the necessity for showing a possession for twenty years was laid down by Holt, C.J., in 1699; but it was apparently not till the beginning of the nineteenth century that it was clearly ruled that possession for a less period was insufficient. In 1829, in the case of *Doe d. Wilkins v. Marquis of Cleveland*,[1] it was held that "no possession short of twenty years was sufficient to warrant the jury in presuming the fact of livery of seisin";[2] and this was approved by Parke, B., in 1837—"if," he said, "the fact of livery of seisin is sought to be inferred from *possession alone* such possession ought to have existed for twenty years."[3] The reason for this rule is obvious. The defendant is in possession, and therefore presumably entitled in fee simple. Though prior possession for twenty years does raise the inference that the person so possessed had an absolute right by virtue of the statute, possession for a less time can raise no inference

ejectment must prove a right of property good as against the world. Thus the conception of property. as a right good as against all the world was introduced into the land law by the action of ejectment; we shall see that the same conception was introduced into the law as to chattels personal by the action of trover, below 426-430. Lightwood admits that the proposition that the right, which the plaintiff in ejectment must show, must be an absolute right to enter, follows from the rule that the plaintiff must show a possession for twenty years, Lightwood, Possession of Land, 113.

[1] 9 B and C 864. [2] *per* Littledale, J., at p. 871.

[3] Doe d. Lewis v. Davies (1837) 2 M. and W. at p. 516.

at all. Therefore the presumption in favour of the defendant stands. As Cole says,[1] "proof of mere possession by the plaintiff, or of the person through whom he claims, within twenty years before action, is not generally sufficient to support an ejectment, because the defendants in such action *are sued as tenants in possession;* and their possession is presumed to be lawful, in the absence of proof of title in the claimants." But it must be noted that this principle does not apply in the two following cases: (*a*) we have seen that if an action of ejectment is brought against a trespasser, the plaintiff is entitled to recover merely on proof of his possession and its disturbance by the defendant, just as if he had brought an action of trespass.[2] (*b*) If an action of ejectment is brought against a defendant whose possession is not adverse to that of the plaintiff (e.g. if the defendant is in possession merely as a bailiff for the plaintiff) the plaintiff, by construction of law, is and has always been in possession; and the defendant, being estopped from disputing this fact, the plaintiff is entitled to succeed.[3] It is on this principle, as Radcliffe and Miles point out,[4] that the decision in *Asher v. Whitlock*[5] can be supported.

(ii) (*a*) The defendant can negative the title of the plaintiff, by proving that some third person is entitled to the property—by setting up, that is, a *jus tertii*. This is illustrated by cases which turn on the clause of a statute of 1561,[6] which provided that the lease of a benefice should only last so long as the lessor was ordinarily resident and serving the cure; and that, if he was absent for 80 days, the lease should at once become void. In one of these cases it was even held that a plaintiff could not rely upon a lease which had become void under this statute, and must fail in an action of ejectment, even though the action was brought against a trespasser,[7] though he could of course succeed as against a trespasser in an action of trespass.[8] This, as we have seen,[9] is not law now. But it would still be true to say that if, in such circumstances, the lessee tried to sue a defendant who was not a mere trespasser, the defendant could set up the fact that the lease under which he claimed was void. Thus when the lessee tried to recover from the rector who had made the lease, he failed in his action, because the rector was able to prove that the title was in

[1] Law and Practice of Ejectment (ed. 1857) 212. [2] Above 59.

[3] For the doctrine of adverse possession before the Real Property Limitation Act of 1833 see below 69-72; for the later doctrine since 1833 see below 78-79, and the cases cited in note 3.

[4] Cases Illustrating the Law of Torts 282.

[5] (1865) L.R. 1 Q.B. 1. [6] 13 Elizabeth c. 20.

[7] Doe d. Crisp v. Barber (1788) 2 T.R. 749; cf. Frogmorton d. Fleming v. Scott (1802) 2 East at p. 469 *per* Lord Ellenborough, C.J.; above 59-60.

[8] Graham v. Peat (1801) 1 East 244; above 59. [9] Above 59-60.

another—namely himself.[1] Similarly, when a landlord sued his tenants for possession, it was held that, if the tenants could show that the landlord's lease was expired, so that the title was in a third person, the landlord must fail in his action.[2]

(*b*) A fortiori the plaintiff cannot recover, if his own statement of his case negatives his title, and shows that the title is in another. This was decided in the much controverted case of *Doe d. Carter v. Barnard*.[3] In that case the facts were as follows: In 1815 one Robert Carter purchased the premises and went into possession. He did not pay all the purchase money till 1824, and no conveyance was made to him till that date. Immediately after the purchase in 1815, Robert Carter allowed his son John to occupy the premises rent free as his tenant at will. John continued this occupation till his death in 1834. He left a widow, who was the lessor of the plaintiff, a son, and other children; and, at the time of his death, Robert Carter was still alive, though he had died before this action was brought. The widow was in occupation from 1834 till a short time before this action was brought. The defendant was a mortgagee to whom Robert Carter had mortgaged the property in 1829. In a previous action brought by this mortgagee[4] he had failed, because it was held that, in the circumstances, his right to sue and his title to the property were barred by the Real Property Limitation Act of 1833.[5] But in this action the mortgagee had got possession, and was therefore in the position, not of plaintiff, but of defendant. It was therefore for the plaintiff to prove her title. The court held that she might have satisfied this burden of proof if she had relied merely on her previous possession for thirteen years (1834-1847). "The ground of so saying would not be that possession alone is sufficient in ejectment (as it is in trespass) to maintain the action; but that such possession is prima facie evidence of title, and, no other interest appearing in proof, evidence of seisin in fee."[6] If in such a case the defendant had attempted to negative this prima facie evidence of title by relying upon his mortgage of 1829, he would not have succeeded in doing so, because his right to sue and his title to the property were barred.[7]

[1] Frogmorton d. Fleming v. Scott (1802) 2 East 467; cp. Doe d. Harding v. Cooke (1831) 7 Bing. at p. 348 *per* Alderson, J.

[2] "It was certainly competent to the defendant to show that the lessor's title had expired; and that he had no right to turn him out of possession," England d. Syburn v. Slade (1792) 4 T.R. at p. 683 *per* Lord Kenyon, C.J.; cp. also Tregonwell v. Strachan (1743) 5 T.R. 107 n.; Doe d. Wawn v. Horn (1838) 3 M. and W. 333.

[3] (1849) 13 Q.B. 945.

[4] Doe d. Goody v. Carter (1847) 9 Q.B. 863.

[5] 3, 4 William IV. c. 27 §§ 2 and 7.

[6] At p. 953.

[7] This would not necessarily have been the case under the earlier Acts of Henry VIII. and James I. (vol. iv 484-485), which barred only the remedies by action or entry and not the title; thus in Doe d. Burrough v. Reade (1807) 8 East at p. 356, "The court all agreed, that the defendant, being lawfully in possession, might defend

"Here, however, the lessor of the plaintiff did more, for she proved the possession of her husband before her for eighteen years, which was prima facie evidence of his seisin in fee, and, as he died in possession and left children, it was prima facie evidence of the title of his heir, against which the lessor of the plaintiff's possession for thirteen years could not prevail, and therefore she has by her own showing proved the title to be in another, of which the defendant is entitled to take advantage." [1]

It is clear that this judgment is really inconsistent. It is only upon the hypothesis that the defendant was a trespasser that the plaintiff's prior possession for thirteen years could have entitled him to succeed; and, if he was a trespasser, the fact that the title was in another, whether by the plaintiff's own showing or not, seems to be immaterial. The decision can only be supported on the hypothesis that, on the facts, it was a case where a plaintiff was suing another, who was in possession of his property, without having committed a trespass against him (the plaintiff); and where, therefore, he must recover, if at all, on the strength of his own title. Whether that was a correct view to take of the facts is more than doubtful; but, if these were the facts assumed by the court, it is a good illustration of the proposition that the plaintiff in ejectment must prove his title.

(iii) [The plaintiff can recover if he can show that he or his predecessors in title have been in possession for the period required by the existing statutes of limitation; and if his right to get possession is not barred by those statutes.] Thus, suppose that in the case just discussed John Carter's son had entered into possession on his death, and had remained in possession till 1849, it is clear that he could have recovered against the defendant; for he could have shown that he and his father had been in possession for over twenty years. On the other hand, as we have seen, the mortgagee in that case failed when he tried to sue as plaintiff, because his right to sue and his title to the property were barred by the statute.[2] We have seen that this principle was laid down by Holt, C.J., in 1699;[3] and that it is perfectly well settled by the modern cases.[4]

himself upon his title, though twenty years had run against him before he took possession; such twenty years possession not being the possession of the lessor of the plaintiff."

[1] 13 Q.B. at p. 953; it may perhaps be noted that this decision really rests upon a principle similar to the principle of pleading stated in Trevilian v. Pyne (1706) 1 Salk. 107; it is there laid down that where, in an action of trespass quare clausum fregit, the defendant justifies by the command of J. S. the owner of the freehold, and the plaintiff merely traverses the command, the plaintiff will fail, because such traverse admits the freehold to be in J. S. and leaves the plaintiff with no cause of action.

[2] Doe d. Goody v. Carter (1847) 9 Q.B. 863.

[3] Stokes v. Berry 2 Salk. 421; above 63.

[4] Above 64.

In these ways the new conception of ownership, as an absolute right available against the whole world, was introduced into the English law. But the manner in which it was introduced, through the working of the action of ejectment, tended to preserve the continuity of the development of the land law. A plaintiff in making his claim, and a defendant in resisting it, necessarily relied both on the older mediæval principles, and the newer doctrines which had come with the statute of Uses and with the new devices employed by the conveyancers. It was laid down by Coke that matters, such as a collateral warranty, which could have been pleaded in bar to a real action, could be given in evidence in the action of ejectment, and thus used by the defendant to rebut the plaintiff's claim.[1] So in *Smith v. Tyndal*[2] "the court held that the plaintiff in ejectment may make title by a collateral warranty, and give it in evidence as his title. So if a disseisor dies after five years quiet possession, and the disseisee enter, the heir may maintain an ejectment, for the right of possession belongs to the heir, though the mere right be in the disseisee." Similarly in the case of *Martin d. Tregonwell v. Strachan*[3] it was necessary to explore the learning as to inheritance, and the rules as to when a fee would descend ex parte paterna or ex parte materna.[4] We can see too from the facts in *Taylor v. Horde*, and many other cases, that the manner in which the newer doctrines had been blended with the old by the art of the conveyancers, caused both sets of doctrines to be constantly in evidence in the pleadings in these actions of ejectment. It was the survival of some of the mediæval doctrines which prevented this new conception of ownership from getting an undisputed sway. For, as we shall now see, a man might have a better right to property, and yet, because he had not got a right of *entry*, he might be unable to succeed in an action of ejectment.

(2) The plaintiff must show that he had a right of *entry*.

We have seen that in certain cases the mediæval law, which favoured the person seised at the expense of the person disseised, still survived. A discontinuance or a descent cast destroyed the disseisee's right of entry, and therefore precluded him from suing by action of ejectment.[5] The same result followed if a disseisor levied a fine, and no claim was made for five years.[6] Moreover,

[1] Edward Seymor's Case (1613) 10 Co. Rep. at f. 97b—"It was resolved that if the collateral warranty should bind, that it might well be given in evidence. . . . For although a collateral warranty gives not a right, yet in law it bars and binds a right, and therefore may be given in evidence; and *eo potius* because now in *ejectione firmæ*, and other personal actions it cannot be pleaded by way of bar."

[2] (1706) 2 Salk. 685.

[3] (1743) 5 T.R. 107 note.

[4] See vol. iii 179-180 for some account of these rules.

[5] Above 20-21.

[6] Above 51.

a disseisee, though barred of his right of entry by James I.'s statute of limitation, might yet succeed in a real action, if he brought it within the time allowed by the statute of Henry VIII.[1] In these cases, therefore, the survival of the old law prevented the new conception of property from getting an undisputed sway. But, in this period as in the last, the courts struggled to escape from some of these consequences of the older law, and to help the man with the better right. We have seen that the most effective means which they used to produce this result was the development of the doctrine of disseisin at election ;[2] and that it was the desire to extend this doctrine which led Lord Mansfield to propound his heretical views as to the nature of seisin and disseisin in the case of *Taylor v. Horde*.[3] This doctrine, as further developed and applied to the action of ejectment, gave rise to the doctrine of adverse possession. But the development and application of this doctrine falls more naturally under the next head.

(3) The plaintiff must show that he had a right of entry *which was not barred.*

We have seen that a disseisee's title might be barred by a fine levied in accordance with Henry VII.'s statute of Fines,[4] and that his right of entry might be barred in twenty years by James I.'s statute of limitation.[5] But no one could levy a fine which would have this result unless he were seised, because, if he were not, the fine might be avoided by showing that the parties to it had nothing in the land ;[6] and obviously a person in whose favour the statute of limitation was running must be seised or possessed, and the former owner disseised or dispossessed.[7] Thus it became important to ascertain whether or not a person had such a seisin as would enable him to levy a fine, or such a seisin or possession as would cause the statute of limitation to run in his favour. Such a seisin or possession came to be known as "adverse possession," to distinguish it from other cases where a person had physical control, but not a physical control of such a nature that it would enable him to levy a fine, or cause the statute of limitation to run in his favour.

It would be generally true to say that, in cases where a person was merely disseised at election, the so-called disseisor would not have such a seisin or possession as would enable him to levy a fine, or cause the statute of limitation to run in his favour.[8]

[1] Above 52. [2] Above 41-42. [3] Above 43-44.
[4] Above 51. [5] Above 51-52. [6] Vol. iii 236.

[7] "The Statute of Limitations never runs against a man, but when he is actually ousted or disseised," Reading v. Royston (1702), 2 Salk. 423.

[8] 2 Smith, Leading Cases (10th ed.) 634—"Whenever the question arose whether a particular claimant was barred by having been twenty years out of possession, the

Now we have seen that the doctrine of disseisin at election had come to rest upon the idea that the intention of the parties must be regarded; and that, unless there was an intention to "usurp the possession and to oust another of his freehold," there was no true disseisin.[1] This idea was at the root of the distinction between possession and adverse possession. The distinction was a broader and a more intelligible expression of the older doctrine of disseisin at election, which was developed by the working of the action of ejectment, and adapted solely to the determination of the question whether the possession was of such a kind that the statute of Fines or the statutes of limitation would run in favour of the possessor.[2] This was very clearly pointed out by the Master of the Rolls in *Cholmondeley v. Clinton.*[3] "The statute," he said, "requires as an indispensable preliminary, that the plaintiff in a possessory action should show that he has had possession of, or made an entry into the estate, within the limited period. The *onus probandi* lies upon him. The enquiry into the nature of the possession is . . . material with a view . . . to ascertain whether it has been such during this period, as to make good what the plaintiff is to prove in order to entitle him to his action; *viz.* whether it shows him to have had, during any part of the period, by himself or by another, the actual possession; or whether the estate has, during the whole time, been in fact held and enjoyed by an adverse claim of title, that is, a claim not consistent with the title of the plaintiff." Thus possession under a title is referable to that title, and cannot therefore be adverse to the person entitled, while the possession is held under that title; and even if the tenant held on, after his title to a particular estate had expired, he would be a tenant at sufferance and no adverse possessor.[4] A fortiori, neither a permissive occupation [5] nor a possession as tenant at will could be adverse.[6] On this principle the mortgagor's possession is not adverse to the mortgagee,[7] and the

mode of solving this question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a *right of entry*; for if he had, then, as that right of entry would be barred by St. 21 Jac. 1 at the end of twenty years, the possession during the intermediate time was *adverse* to him."

[1] Co. Litt. 153b; above 41.

[2] It is true that in Doe. d. Parker v. Gregory (1834) 2 Ad. and El. 14 a distinction was drawn between a possession adverse for the purpose of avoiding a fine, and a possession adverse for the purpose of enabling the statute of limitation to run; but the better opinion seems to be that there was no real distinction between these two kinds of adverse possession; for a discussion on this point see 2 Smith, Leading Cases (10th ed.) 636-639.

[3] (1820) 2 Jac. and Walker at p. 164.

[4] Doe d. Milner v. Brightwen (1809) 10 East 583.

[5] Doe d. Jackson v. Wilkinson (1824) 3 B. and C. 413.

[6] Smartle v. Williams (1695) 1 Salk. 245; Hall v. Doe d. Surtees (1822) 5 B. and Ald. 687.

[7] Ibid.

cestuique trust's possession is not adverse to that of the trustee.[1] Similarly, the possession of one tenant in common is not as a rule adverse to the other tenants in common.[2]

Now it is clear that the principle underlying this doctrine of adverse possession is very similar to that underlying the doctrine of disseisin at election; and, in fact, the authorities which decided whether or no this or that case of disseisin was an actual disseisin or disseisin at election merely, were often cited to distinguish cases of adverse from non-adverse possession. Thus we have seen that Coke had laid it down that holding over by a tenant, which made him a tenant at sufferance, amounted to disseisin at election only.[3] This passage from Coke was cited in 1814 to prove that a fine levied by the heir of such a tenant was no bar to the true owner's right to bring ejectment.[4] And, similarly, the rule that neither a tenant at will nor a tenant at sufferance could be an actual disseisor was used in 1695 to prove that the mortgagor's continued possession was not adverse, so as to divest the mortgagee's right to enter or to bring ejectment.[5] The rule that the possession of one tenant in common is not as a rule adverse to the other tenants in common is as old as Littleton;[6] and it was easy to state it in terms of the doctrine of adverse possession. Thus it may be said that the doctrine of adverse possession was planted upon ground well prepared to receive it, not only by the doctrine of disseisin at election, but also by other rules of the common law. Its growth was therefore more speedy than would have been possible if it had been altogether new doctrine. Indeed that growth was natural and almost inevitable in the circumstances. Just as the action of ejectment, round which it grew up, owed something to the real actions,[7] so it owed something to the older doctrines of seisin and disseisin, much to those modifications of the doctrines of seisin and disseisin which had been made in the interests of the true owner,[8] and most to that

[1] Keane d. Byron v. Deardon (1807) 8 East 248.

[2] Litt. § 322; Co. Litt. 199b; Reading's Case (1702) 1 Salk. 391—"One tenant in common may disseise the other; but it must be by actual disseisin, as turning him out, hindering him to enter, etc. But a bare perception of profits is not enough"; Doe d. Fisher v. Prosser (1774) 1 Cowper at p. 218.

[3] Above 40.

[4] Doe d. Burnell v. Perkins (1814) 3 M. and S. at p. 273.

[5] In the case of Smartle v. Williams (1695) 1 Salk. at p. 246, Holt, C.J., said, "Upon executing the deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will, and the assignments of the mortgagees could only make the mortgagor tenant at sufferance, but his continuing in possession could never make a disseisin, nor divesting of the term"; on the other hand, as was pointed out by Plumer, M.R., in Cholmondeley v. Clinton (1820-1821) 2 Jac. and W. at pp. 179-180, though the possession of the mortgagor is not adverse to the mortgagee, "the possession of the mortgagor is adverse to every other claimant of the equity of redemption, because it is inconsistent with his claim of title"; see also ibid at p. 187.

[6] § 322; Co. Litt. 199b. [7] Above 15-19. [8] Above 31 seqq.

particular modification of these doctrines which had given rise to the doctrine of disseisin at election.[1]

But, though the principle underlying the doctrine of disseisin at election was very similar to that underlying the doctrine of adverse possession, the two doctrines were not used for quite the same purposes; and the later doctrine was wider in its scope. We have seen that the doctrine of disseisin at election was used to counteract those many advantages of seisin which favoured a disseisor at the expense of the true owner—his power, for instance, to create a tortious fee by feoffment, as well as his power to exclude the true owner's title by the levy of a fine, and his power to bar the true owner's right of action by the lapse of time fixed by the statutes of limitation. On the other hand, the doctrine of adverse possession was, as was pointed out in *Cholmondeley v. Clinton*,[2] directed to defining the kind of possession which would cause the five years required by the statute of Fines, or the twenty years required by James I.'s statute of limitation, to run. "The bar arising from the statute (of limitation) and the effect of time upon non-claim and adverse possession, are subjects totally distinct from the consequences following, by the common law, upon disseisin abatement and intrusion."[3] But though the purposes for which the doctrine of adverse possession was used were more limited than the purposes for which the doctrine of disseisin at election was used, its scope was wider. It was a part of those more general doctrines of ownership and possession which were growing up round the action of ejectment; and though in its origin and development it owed something to ths doctrine of disseisin at election, it had come to be quite independent of that doctrine. It was for this reason that equity, which had never accepted the common law principles which favoured the disseisor at the expense of the disseisee, accepted this doctrine, and applied it to equitable, in much the same way as the common law applied it to legal estates. But of this I shall speak more fully in the following section.

(4) The plaintiff must show that he had a *legal* right of entry. We have seen that Lord Mansfield's attempt to give effect to equitable rights in the action of ejectment failed.[4] It followed that all questions of the ownership and possession of equitable estates were determined by the court of Chancery. The courts of common law did not recognize the title of the equitable owner. As in the days before the statute of Uses, they would only recognize such a relationship as trustee and cestuique trust

[1] Above 41-43.
[2] (1820-1821) 2 Jac. and Walker at p. 164.
[3] Ibid.
[4] Above 19-20.

occasionally and indirectly.[1] For instance, they would recognize the existence of trustee and cestuique trust to the extent of regarding the latter as a species of tenant at will of the trustee, and therefore as incapable of having, as against the trustee, an adverse possession.[2] But otherwise the trustee was the owner to all intents and purposes, and the cestuique trust a person who had a merely precarious and permissive enjoyment at the will of the trustee.[3] The equitable estate of the cestuique trust, being thus entirely disregarded by the common law, the principles of the law as to the ownership and possession of equitable estates was left to be shaped by the court of Chancery; and, in constructing these principles, equity did what it had done before the passing of the statute of Uses,[4] it followed the law. In fact the settlement of the law owed something to the older rules applied to uses before the passing of statute. Thus, after some fluctuations of opinion, it was decided that there was no right to dower out of a trust estate, any more than there had been out of a use;[5] and, after considerable argument, it was ultimately settled that there could no more be an escheat of a trust estate than of a use.[6] On the other hand, the older law applicable to uses was not followed in all respects. The husband was allowed an estate by the curtesy from his wife's trust estate of inheritance, though curtesy had not been allowed out of the estates which were held to her use.[7] In fact there was a tendency to follow the law applicable to legal estates more closely than it had been followed by the mediæval chancellors. "Twenty years ago," said Lord Mansfield in *Burgess v. Wheate*,[8] "I imbibed this principle that the trust is the estate at law in this court, and governed by the same rules in general, as all real property is, by limitation. Everything I have heard, read, or thought of since has confirmed that principle in my mind." Similarly Lord Hardwicke pointed out that equity "allowed trust estates to have the same consequences in point of property with legal estates"; and that it gave their owners similar powers.[9] The chancellors were in fact very free to adopt what rules they pleased for the regulation of these new trust estates. We have seen that equitable trusts of freehold interests in land were not regularly enforced till after the Restoration;[10] and Lord Mansfield was probably right, when he said,

[1] Vol. iv 430-431.
[2] Keane d. Byron v. Deardon (1807) 8 East 248; above 71.
[3] Cholmondeley v. Clinton (1820-1821) 2 Jac. and W. at p. 147.
[4] Vol. iv 437-438. [5] Vol. iii 196-197. [6] Ibid 71-72.
[7] Ibid 188. [8] (1757-1759) 1 Eden at p. 224.
[9] From the fuller report of Hopkins v. Hopkins (1738) 1 Atk. 581 printed in Cholmondeley v. Clinton 2 Jac. and W. 18 n. *b*.
[10] Vol. vi 641-642.

in *Burgess v. Wheate*, that they "were not on a true foundation till Lord Nottingham held the great seal."[1]

It was natural that the later chancellors should find that they could follow the modern common law more closely than their predecessors had followed the mediæval common law; for the rules of the modern common law were far more consonant to the principles of equity than the mediæval. This fact was particularly obvious in the case of the modified rules which had come to regulate the ownership and possession of legal estates. These modified rules made it possible for equity to follow the law, not only as to the kinds and incidents of the estates in the land which it recognized, but also as to the principles applicable to the ownership and possession of these estates. The fact that it was possible to follow these principles was quite a modern phenomenon. It was the result of the new principles of ownership and possession which, as we have seen, had long been developing, and were, at the latter part of the seventeenth century, fast re-shaping the law on this topic.[2] As we shall now see, these modifications of the common law principles, and new developments of equitable principles, were bringing together the legal and equitable rules as to the ownership and possession of land, in a manner which would have been quite impossible in the Middle Ages. In the Middle Ages the common law principles as to the effects of seisin and disseisin,[3] and the nascent equitable ideas as to equitable ownership[4] had nothing in common. We have seen that the mediæval common law gave all the rights and privileges of ownership to the person seised, and little more than a right of entry or action to the person disseised. The person seised, though tortiously, was in a far stronger position than the rightful owner who was disseised. We have seen that the equity of the beginning of the sixteenth century had created for the cestuique use or trust a right which was to all intents and purposes ownership, except as against a bona fide purchase for value of the legal estate without notice of the use or trust. Thus while the common law concentrated its attention on the fact of seisin, equity concentrated its attention on the rights of the equitable owner. There could be little in common between conceptions so diverse; and in fact equity, both before and after the statute of Uses, ignored the common law principles of seisin, and the consequences which the common law deduced from them. Lord Hardwicke pointed out in *Hopkins v. Hopkins*[5] that, though the

[1] (1757-1759) 1 Eden at p. 223; for Lord Nottingham and his work see vol. vi 539-548.

[2] Above 59-61. [3] Vol. iii 91-92. [4] Vol. iv. 433-437.

[5] From the fuller report printed in 2 Jac. and W. 18 n. *b*.

tenant of an equitable estate had powers of alienation similar to those possessed by the owner of the legal estate, and that though he could use all the ordinary common assurances, "and rightful modes of conveyancing" such as fines and recoveries, yet, "it has never yet been allowed that in a trust estate, the like estate may be gained and transferred by wrong, as might be by the common law of the legal estate. Therefore upon a trust in equity no estates can be gained by disseisin, abatement, or intrusion. It is true there may be a disseisin, abatement, or intrusion upon the trustee, but that is as it affects and binds the legal estate; but of the mere trust or equitable interest, there can be no such thing whilst the trustee continues in the possession of the land." Similarly though, as we shall see, a destruction or abeyance of the seisin of the estate of freehold, upon which a contingent remainder depended, was fatal to such a remainder, this cause of failure was never allowed to affect interests which took effect as uses, devises, or trusts.[1] The seisin of the feoffees, heirs, devisees, or trustees, prevented any such catastrophe. Behind the screen of the seisin vested in them, the conception of equitable ownership was constructed, wholly independently of the common law doctrines of seisin.

But, by the beginning of the eighteenth century, we can see signs of an approximation between the legal and the equitable conceptions of ownership and possession. On the one hand, the tendency of the common law, as far back as the latter part of the mediæval period, had been to lay less stress on the fact of seisin and more on the right to get seisin.[2] This tendency had, as we have seen, been helped to some extent by the Legislature[3] and, all through this period, was favoured by the judges.[4] Consequently, the common law was beginning to gain some conception of the idea of an abstract right of ownership.[5] On the other hand, equity was beginning to be faced with the problem of settling the position of the possessor of an equitable estate who had no title thereto. What was the position of such a possessor as against third persons and the true owner? Were the true owner's rights barred by lapse of time? It is true that the latter question could not arise as between cestuique trust and trustee, when the trustee had active duties to perform for his cestuique trust; for, as was recognized even by the courts of common law, the existence of these duties prevented the possession of cestuique trust and trustee from being adverse to one another.[6] But there were

[1] Below 105-107, 122.
[2] Vol. ii 583-585; vol. iii 92-93.
[3] Vol. iv 483-484; above 32.
[4] Above 32-46.
[5] Above 64.
[6] Above 71; the principle was thus explained by Lord Eldon in Cholmondeley v. Clinton (1821) 4 Bligh at p. 95—"In the case of strict trustee and cestuique

many cases in which the legal estate might be outstanding in a trustee who had no active duties to perform, or in a mortgagee; and in these cases the equitable estate might be in the possession of a cestuique trust or a mortgagor, who, for one reason or another, had no title to the estate.[1] In such cases equity found it necessary to recognize, not only the rights of the owner, but also the rights of a possessor, just as the common law had found it necessary to recognize not only the rights of the person seised, but also the rights of the owner.

We have seen that, even in the Middle Ages, equity had recognized that the incidents of the equitable ownership of interests in land should be assimilated, when possible, to the incidents of the ownership of legal interests.[2] It now recognized that the common law of the seventeenth and eighteenth centuries must be followed in determining the relative positions of the owners and possessors of equitable estates. Equity finally decided, in the case of *Cholmondeley v. Clinton*,[3] that it would apply to the possessor of an equitable estate the common law rules of adverse possession; and that, by virtue of James I.'s statute of limitation,[4] such a possessor would get a good equitable, as he got a good legal title, by twenty years possession. This was a very different principle from the vague rule that equity would not assist stale demands; or from the principle that equity acted only by analogy to the statute;[5] or even from the rule that the statute "virtually in-

trust, you are to consider not only what was done, but what it was the duty of the person to do. It is the duty of the trustee to take care of the interest of the cestuique trust, and there are many cases in which you will not permit that individual to do anything for his own interest, adverse to the interest of the cestuique trust. So a termor has a duty to preserve the interest of his landlord, and there are many acts, therefore, which may be done both by a trustee and a person claiming in the character of a termor for years, which, if they were done by persons standing in other relations, would be acts to be denominated acts of adverse possession; but when the law makes it the duty of a man to abstain from doing those acts, the law will not permit him to say they are acts of adverse possession having the effect of acts of adverse possession."

[1] Though the possession of cestuique trust or mortgagor is not adverse to the trustee or mortgagee, it might well be adverse to the true owner of the equitable estate, as was pointed out in Cholmondeley v. Clinton (1820-1821) 2 Jac. and W. at pp. 179-180 cited above 71 n. 5.

[2] Vol. iv 437-438.

[3] (1820-1821) 2 Jac. and W. 1; (1821) 4 Bligh 1; for a good account of the case see Lightwood, Possession of Land 167 seqq.

[4] "I take it (James I.'s statute of limitation) therefore to be a positive law which ought to bind all courts, and for that reason I have taken the liberty in another place to say, that I considered it not simply a rule adopted by courts of equity by analogy to what had been done in courts of law under the statute, but that it was a proceeding in obedience to the statute, and that the framers of that statute must have meant that courts of equity should adopt that rule of proceeding," *per* Lord Redesdale, Cholmondeley v. Clinton (1821) 4 Bligh at pp. 119-120; and cp. 2 Jac. and W. at p. 149.

[5] This seems to have been the view taken by Lord Redesdale in Bond v. Hopkins (1802) 1 Sch. and Lef. at p. 429.

cluded" courts of equity.[1] For it recognized that James I.'s statute of limitation governed the right of the equitable possessor; and it thereby gave equity a doctrine of possession as well as of ownership. Though the court of Chancery declined, as it had always declined, to mix itself up with the common law rules as to disseisin,[2] and declined, as it had always declined, to have anything to do with the real actions and the statutes of limitation applicable thereto, it adopted the doctrine of adverse possession which had grown up round the action of ejectment and James I.'s statute of limitation.[3] Thus, by the beginning of the nineteenth century, English law got a coherent and uniform body of principles applicable both to legal and to equitable estates in land.

Throughout the eighteenth century the tendency of the development of the law as to the ownership and possession of legal and equitable interests in land had been in the direction of assimilation. On the one hand, the common law was beginning to acquire a conception of ownership based on an absolute right to possession, which, though it differed somewhat from equitable ownership, yet had many more affinities with this ownership than the mediæval conceptions of seisin and disseisin. On the other hand, equity was developing conceptions of ownership and possession similar to those which were being developed by the working of the action of ejectment; and when, at the beginning of the nineteenth century, it accepted the common law doctrine of adverse possession, the similarity between the two sets of principles became far more marked than their dissimilarity. Therefore a possibility of ultimate fusion came into sight. Lord Mansfield rightly interpreted the direction of the development of this branch of the law, when he tried to give effect to equitable rights in the action of ejectment,[4] to limit, by his new definition of seisin and disseisin, the powers of a disseisor,[5] and to extend the right of escheat to equitable estates.[6] But the time was not then propitious for the development of the law on these lines by the Legislature; and these developments involved changes which only the Legislature could make. A great judge can do much to shape the development

[1] This seems to have been Lord Redesdale's view in Hovenden v. Lord Annesley (1806) 2 Sch. and Lef. at p. 631.

[2] 4 Bligh at pp. 96 and 105 *per* Lord Eldon; 2 Jac. and W. at p. 155 *per* Plumer, M.R.

[3] Thus Lord Redesdale, 4 Bligh at p. 118, said, "It has been attempted, at your bar, to argue upon the ground that Lord Cholmondeley, claiming as heir, might bring a writ of right, if the question was open at law; but that is a particular writ, in which particular privileges are allowed, and the courts of equity have never regarded that, or the writ of formedon, or any other particular writ, but have considered the limitation in the statute of James I. of twenty years after the rights or title of entry accrued, as that which was to decide."

[4] Above 19-20. [5] Above 43-46.

[6] Burgess v. Wheate (1757-1759) 1 Eden 177; vol. iii 72.

of new branches of the law which are as yet in a plastic state, because the ground is not covered by detailed rules. Lord Mansfield's own feats in shaping the development of commercial law are the best illustration of this fact. But, as I have already pointed out, the land law was the oldest part of the common law; and the ground was covered by a large number of principles which had been worked out into a maze of precise and detailed rules, which came from all periods in the long history of the common law. Hence, any changes which infringed these principles, could be and were immediately proved by precedent and history to be bad law. Therefore Lord Mansfield's attempts to anticipate future developments in this and other branches of the land law failed—and rightly failed. But the intelligence of his anticipations is, as we shall now see, proved by the fact that they foreshadowed the main lines upon which the Legislature in the nineteenth century has developed this branch of the land law.

Lines of Future Development

From the epoch of legislative reform which set in after the passing of the Reform Act of 1832, the Legislature began to mould the law as to seisin, possession, and ownership upon lines which Lord Mansfield would have approved. We have seen that the Real Property Limitation Act of 1833,[1] which abolished the real actions, abolished also the doctrines of discontinuance, descents cast, and collateral warranty;[2] and the Act of 1845[3] abolished the tortious operation of a feoffment. One effect of the Act which abolished fines in 1833[4] was to take away from a disseisor or his alienee the power to bar the true owner's rights by levying a fine; and, in consequence, the last remnants of the power of a disseisor to affect the true owner's right of entry disappeared. Hence it was found to be both desirable and possible to abolish, by the Real Property Limitation Act, 1833,[5] the whole doctrine of adverse possession. That doctrine was a very technical doctrine and, as we have seen, it was, in its origin, much involved with the now obsolete doctrine of disseisin at election.[6] But it rested upon a substantial basis of fact, because if is obvious that it is not every possession that can be allowed to give the possessor a title by lapse of time. A person may be in possession as servant, bailiff, guardian, or agent for the owner, or

[1] 3, 4 William IV. c. 27 § 39; above 23.
[2] Ibid. [3] 8, 9 Victoria c. 106 § 4.
[4] 3, 4 William IV. c. 74.
[5] 3, 4 William IV. c. 27 §§ 2 and 3, subject however to the purely temporary provision of § 15; see Nepean v. Doe d. Knight (1837) 2 M. and W. 894.
[6] Above 69-72.

otherwise in a fiduciary relation to him.[1] This principle was stated by Coke;[2] and clearly such a person cannot, and, if he is honest, would not wish, to claim a title under the Real Property Limitation Act. As the result of the abolition of the old doctrine of adverse possession by this Act, it has been necessary to revive this old principle; and, by its means, to re-establish a doctrine of adverse possession of a new kind, in order to distinguish the kind of possession in favour of which the statute will run, from the kind of possession in favour of which it will not run.[3] This large simplification of the law was never even hinted at by Lord Mansfield. But the other developments were along the lines which he had suggested; and, later in the century, the Judicature Acts went a long way to realizing his ideal of giving effect in one action to the equitable as well as to the legal rights of the parties.

As we have seen, the action of ejectment was thus left the sole action in which a dispossessed owner could assert his rights to land.[4] Therefore the theory of ownership and possession, which had grown up round the action of ejectment, became the theory of the common law. But the principles of the law of ownership and possession as thus developed, bore marks of the three chief periods in the history of that law. From the mediæval period it derived the principle that the person seised or possessed is prima facie the owner in fee simple—that ownership is in effect a seisin or possession which none can dispute. From the period of the sixteenth, seventeenth and eighteenth centuries it has derived the ideas, firstly, that a true owner ought generally to be able to recover his possession by entry or action of ejectment against the possessor; and secondly that, as ownership is a true jus in rem—a right as against all the world—, a person who wishes to recover against the possessor must show, not merely a better right than the possessor, but an absolute right. From the legislation of the nineteenth century came the completion of the

[1] Thus it was held in Bertie v. Beaumont (1812) 16 East 33 that a cottage occupied by a servant rent free as part of his wages is in the possession of the master and not of the servant; for the analogous rule in the case of chattels see vol. iii 363-365.

[2] "If an infant or any man of full age have any right of entry into lands; any stranger in the name and to the use of the infant or any man of full age may enter into the lands; and this regularly shall vest the lands in them without any commandment precedent or agreement subsequent," Co. Litt. 258a; of course the entry of an unauthorized stranger would not stop the statute from running in favour of a third person in possession, if the third person ejected the stranger and continued his possession for the full period after he had thus resumed possession, see Lord Audley v. Pollard (1597) Cro. Eliz. 561.

[3] For these cases of non-adverse possession of the new type see Dean of Ely v. Bliss (1852) 2 De G.M. and G. at pp. 476-477; Thomas v. Thomas (1855) 2 K. and J. 79; Wall v. Stanwick (1887) 34 C.D. 763; Lyell v. Kennedy (1889) 14 A.C. 437.

[4] Above 23.

development made in the preceding period. That legislation has abolished the surviving mediæval rules which, in some cases, still made it possible for a possessor to recover his possession by entry or action of ejectment from an owner who had ejected him—"practically," said Maitland, writing in 1888,[1] "for the last three hundred years and more, theoretically as well as practically for the last fifty years and more, we have had no action in which an ejected possessor could recover possession from the owner who ejected him." It has simplified the law in two ways. Firstly, it gives every owner the power to assert his rights by entry or action of ejectment as against all possessors. Secondly, it takes away from every owner, not only his right of entry or action, but also his title to the property, if another has been in possession of it without acknowledging his title for the period fixed by the Real Property Limitation Act; and it operates in this way, whether the possession of that other has or has not been adverse, provided that it has not been held by a possessor who is merely a tenant, servant, or agent of, or who stands in a fiduciary relation to, the owner. Thus the law as to the ownership and possession of land, as it stands to-day, is a true "jus tripertitum," for its principles are derived from all these three epochs in the history of the common law.

These developments not only simplified the law, they tended also to bring the principles of the law as to the ownership and possession of land into conformity with the law as to the ownership and possession of chattels. We have seen that one of the chief reasons why the law as to the seisin and disseisin of hereditaments, tended to fall apart from the law as to the possession and dispossession of chattels, was the fact that the first was moulded by the real and the second by the personal actions.[2] In spite of this, there were, even in the Middle Ages, fundamental similarities.[3] But the resemblance is closer in the modern common law by reason of the similarity of the actions round which that modern law has grown up. Just as the modern law as to the ownership and possession of land has grown up round the action of ejectment, so the modern law as to the ownership and possession of chattels has grown up round the

[1] Coll. Papers i 456-457; above 22-23. [2] Vol. iii 29, 351-352.

[3] "It will be seen that the seisin of land answers to the possession of goods, 'seisin in law' to the immediate right to possess goods which are neither in one's own possession nor in the possession of anyone holding adversely, and a right of entry to the position of an owner of goods entitled to possess them when they are in some one else's hostile possession; while a disseisee put to his action under the old law may be likened to the owner of chattels whose only remedy, for want of right to the immediate possession, is, or was, a special action on the case," Pollock and Wright, Possession 50; vol. iii 351-352, 359.

actions of trespass and trover;[1] and both ejectment and trover were varieties of the action of trespass. It was only natural, therefore, that, when the law as to the ownership and possession of both land and chattels passed under the sway of these closely related actions, the legal principles underlying these kindred branches of law should tend to approximate.

But though, for this reason, the principles underlying the law as to the ownership and possession of land and of chattels have tended to approximate to one another, the land law and the law as to chattels have remained, and still are, very separate from one another. The reason is, as we shall see, that these two sets of similar principles have continued to be applied in and through two very different sets of legal rules and concepts; for, though the action of ejectment had both simplified and modified the principles which underlay the law as to the ownership and possession of interests in land, the law governing the nature of those interests, and the powers of landowners to create them and to alienate them, were very little affected by these changes. This branch of the law has grown continuously, and it consists of rules coming from all periods in the history of English law. It contains much mediæval doctrine; for, though the real actions have long been obsolete and are now abolished, much of the complex law which they created in the Middle Ages remains. Much was added in the sixteenth, seventeenth, and eighteenth centuries; for then new causes making for further complexity arose—the growth of new interests in land, the increased powers of landowners, and the growing elaboration of conveyances which resulted from the exercise of these powers, the growth of a mass of complicated rules for the interpretation of these conveyances. All these rules—mediæval and modern—were elaborated and developed by the growing mass of case law. All of them were or might be material to the claim or defence of plaintiffs or defendants in an action of ejectment; and thus, as we have seen,[2] the working of that action tended both to settle and to stereotype all this variegated mass of legal doctrine. It is for this reason, as we shall see in the ensuing sections of this chapter, that the divergence of the modern land law from the modern law relating to the ownership and possession of chattels is as wide as, if not wider than, it was in the Middle Ages.

§ 3. Contingent Remainders

We have seen that the legality of a contingent remainder was not admitted till the middle of the fifteenth century; and that then only one variety—a remainder to the heirs of a living

[1] Below 447-458.

[2] Above 17-19, 68-69.

person—was allowed as an exception to the general rule that such remainders were not legally possible.[1] We shall see that during this period other varieties depending upon many other contingencies were allowed to be good. But it would probably be true to say that the older idea, that no contingent remainder is valid except in so far as it is admitted to be valid as an exception to the general rule of the common law, though superseded by the admission of the validity of remainders dependent upon many different sorts of contingencies, has had, right down to modern times, a large influence in shaping the law relating to them. The first question, then, which must be considered is the process by which the law gradually decided to admit the validity of remainders, other than remainders limited to the heirs of a living person, and the conditions under which these remainders were allowed to be valid. It will then be necessary to consider the nature of the interest which a person entitled to a contingent remainder took. We shall see that, partly owing to the strict control exercised by the law upon the kinds of contingent remainders which it admitted to be valid, partly owing to the rules of the common law applicable to the limitation of remainders both vested and contingent, and partly owing to some of the rules relating to seisin, the contingent remainder was an interest which was very easily destroyed. The subject therefore will fall under the following three heads:—The Conditions of the Validity of a Contingent Remainder; the Nature of the Interest Conferred by a Contingent Remainder; and, the Destructibility of a Contingent Remainder.

The Conditions of the Validity of a Contingent Remainder

Before the middle of the sixteenth century, the validity of remainders limited to take effect upon contingencies, other than the contingency of the death of a living person, had been allowed; and some of the conditions under which they were permitted to take effect had begun to be settled. But the comparatively simple settlements in which, up to that time, they were generally used, did not give many opportunities for the solution of the problems to which these extensions of their validity were bound sooner or later to give rise. Any settlement which involved limitations more elaborate than a life estate to the settlor, followed by a vested remainder to living persons, would probably have been effected by way of use; and, as we have seen, it is improbable that, even by way of use, anything more elaborate was frequently attempted.[2]

[1] Vol. iii 134-136. [2] Vol. iv 441.

During the latter part of the sixteenth century these conditions changed. The growth of the prosperity of the country under Elizabeth's rule seems to have revived in the landowners the desire to make permanent settlements of their property, which their heirs could not modify.[1] They would have liked to bring back again those unbarrable entails which had been rendered possible by the interpretation put upon the statute De Donis Conditionalibus,[2] and frustrated by the invention of common recoveries, and the extension to estates tail of the operation of fines.[3] In the language of the sixteenth century, they wished to create "perpetuities"—a word which, as we shall see, was then used as a synonym for an unbarrable entail.[4] At the same time, the effect of the statute of Uses in turning into legal estates many of those future interests which could be limited by the machinery of the use,[5] and the large power to create executory devises given by the statute of Wills,[6] seemed to offer them abundant opportunities for effecting their wishes. Under these circumstances, many cases arose for decision, which involved a discussion of the validity, not only of these shifting and springing uses which had now become legal estates, and of these new executory devises, but also of contingent remainders. For, we shall see that some of the judges, in their endeavours to hinder the designs of the landowners to create a perpetuity or unbarrable entail, were inclined to hold that no future estate, which would not be valid at common law, could take effect as a use.[7] As the common law courts had only admitted the validity of such contingent remainders as they chose to allow, and under such conditions as they chose to impose, this line of reasoning was natural, and, indeed, almost inevitable; for it gave them similar powers to determine the validity of the new interests which had been made legal estates by the statutes of Uses and Wills.

This extreme view did not indeed prevail.[8] But it had the effect of bringing the conditions of the validity of contingent remainders into great prominence; for what could be effected by a contingent remainder was, according to this view, to be taken as the standard by which to test the legality of the purposes attempted to be effected by the use or the executory devise. Hence, during the latter part of the sixteenth and the earlier years of the seventeenth centuries, many of the conditions of the validity of contingent remainders were settled. But the lengthy discussion of these cases by the courts caused the rise of new problems, many of which have not been settled till our own day, and some of which still await settlement.

[1] Below 194.
[2] Vol. ii 350; vol. iii 114-116.
[3] Ibid 118-120.
[4] Below 194 n. 2, 197.
[5] Vol. iv 461-463.
[6] Ibid 465-467.
[7] Below 123-124.
[8] Below 125.

It follows therefore that the discussion of this subject must be divided into two periods—the period which stretches roughly to the middle of the sixteenth century; and the period which lies beyond.

(1) *The first half of the sixteenth century.*

Three principles applicable to remainders, both vested and contingent, and two principles applicable only to contingent remainders, were recognized during this period.

The following three principles are applicable to remainders both vested and contingent.

In the first place, a remainder must await the regular ending of the precedent estate.[1] If X conveyed an estate to A for life, remainder to B, the death of A operated as a limitation which fixed the time for the beginning of B's estate, and B's estate at once began, even though he had not entered. On the other hand, if X conveyed an estate to A for life, remainder to B, and inserted in the conveyance a proviso that, if A failed to pay the rent reserved, B's remainder should take effect, this proviso was void. It was in effect, not a limitation which fixed the duration of A's estate, but a condition which gave a right of re-entry on the breach of it;[2] and, as we have seen,[3] it was only the grantor or his heirs who could take advantage of such a condition.

In the second place, the freehold cannot be limited in futuro.[4] This is perhaps the most fundamental of all the common law rules as to the limitation of estates. It applies to all limitations of estates, whether derived out of an estate in possession or out of an estate in remainder or reversion;[5] and to limitations of estates derived out of existing incorporeal hereditaments.[6] It

[1] It is clear from Colthirst v. Bejushin (1551) Plowden 21, that this principle was then well recognized; at p. 32 Hales, J., said, "And as to what has been said touching the words *if William die living the husband and wife, then it shall remain to* the defendant, which word (*then*) shall be intended presently during the lives of the husband and wife, so as to destroy their estate; sir, the sentence is not to be so understood, but it shall have a beneficial construction, viz. that then it shall remain as a remainder ought to do, and that is, to vest and to be executed after the death of the husband and wife"; see Fearne, Contingent Remainders (9th ed.) 261-262, and the cases there cited.

[2] Cogan v. Cogan (1596) Cro. Eliza. 360; and see Co. Litt. 214b, where this distinction between "a condition that requireth a re-entry, and a limitation that *ipso facto* determineth the estate without any entry," is drawn; "of this first sort no stranger shall take any advantage . . . but of limitations it is otherwise"; Shepherd, Touchstone (4th ed.) 118—"A stranger may take advantage of an estate determined by limitation, and so he cannot upon a condition."

[3] Vol. ii 594 n. 5; vol. iv 416; Litt. § 347.

[4] Litt. § 60; Throckmerton v. Tracy (1556) Plowden at p. 156 *per* Anthony Brown *arg.*; Clampe v. Clampe (1584) Cro. Eliza. 29; Hogg v. Cross (1591) Cro. Eliza. 254; Barwick's Case (1597) 5 Co. Rep. at f. 94b; for a good modern statement of the principle and its various applications see Challis, Real Property (3rd ed.) 104 seqq.

[5] Buckler's Case (1597) 2 Co. Rep. 55a; cp. Y.B. 8 Hy. VII. Trin. pl. 1 (p. 3) *per* Vavisor.

[6] Ibid; Throckmerton v. Tracy (1556) Plowden at p. 156; but otherwise if an incorporeal hereditament be granted de novo, Plowden at p. 156.

follows from this principle that "no remainder may be limited to take effect upon the expiration of an interval of time after the determination of the precedent estate";[1] for otherwise the freehold would in effect be limited in futuro, and, pending the contingency, would be placed in abeyance. It is clear that if a remainder is vested, and limited to take effect as soon as the precedent estate determines, there can be no abeyance of the freehold. But, if a remainder is contingent, there may be such an abeyance, if it is not vested during the duration of the precedent estate or at the same instant as it determines. Therefore, when the validity of a contingent remainder to the heirs of a living person was admitted, it was only allowed to take effect if the heir was ascertained by the death of such living person during the duration of the precedent estate.[2] This, as we shall see, always has been, and, in some cases, still is, a condition of the validity of a contingent remainder.[3]

In the third place, the remainder must pass out of the grantor at the time when the livery of seisin of the particular estate is made—"the growing and being of the remainder is by the livery of seisin to him that shall have the freehold."[4] Thus, if a man lets land for years with remainders over for life or in tail or in fee, "it behoveth that the lessor make livery of seisin to the lessee for years, otherwise nothing passes to them in remainder."[5] Livery of seisin made to the lessee "enures for the benefit of them in remainder."[6] If livery of seisin is not made to the lessee "then is the freehold and also the reversion in the lessor."[7] In other words, the remainder cannot take effect.

The following two principles are applicable only to contingent remainders.

In the first place, though the particular estate upon which a vested remainder depends may be a term of years, because the seisin in such cases is vested in the remainderman, the particular estate upon which a contingent remainder depends must be an estate of freehold, because, pending the contingency, there is no person in whom the seisin can vest; and, therefore, if the precedent estate was not an estate of freehold, the freehold would be in abeyance.[8]

In the second place, if an estate were limited to A for life,

[1] Challis, Real Property (3rd ed.) 82.
[2] Vol. iii 135-136. [3] Below 105, 115-116.
[4] Litt. § 721: Co. Litt. 378a; Colthirst v. Bejushin (1551) Plowden at p. 25 *per* Pollard *arg.*; Bl. Comm. ii 168.
[5] Litt. §. 60. [6] Co. Litt. 49a. [7] Litt. § 60.
[8] Butler v. Bray (1561) Dyer at f. 190b; Chudleigh's Case (1589-1595) 1 Co. Rep. at ff. 130a, 134b; Goodright v. Cornish (1694) 1 Salk. 226; the rule applies, as is shown by Chudleigh's Case, to remainders created by way of use; and, as is shown by Goodright v. Cornish, to remainders created by a devise.

and a remainder in fee simple to the heirs of B, a living person, the question arose, what became of the fee pending the contingency? The feoffor in such a case had alienated the whole fee simple, and, pending the contingency, there was as yet no one ready to take it. This was a speculative question of a sort which delighted the lawyers of the sixteenth and later centuries; and it was a question upon which the mediæval common lawyers were not wholly silent. Littleton had laid it down[1] that, as parsons and vicars could not sue for lands held by them in right of their churches by writ of right, "the right of fee is not in them, nor in any others, etc., but the right of the fee simple is in abeyance, that is to say, that it is only in the remembrance, intendment, and consideration of the law"; and he had admitted that, in the case of the death of a parson, and during the vacancy of a living, even the freehold could be in abeyance.[2] The court in *Colthirst v. Bejushin* had little difficulty in applying the same reasoning to a contingent remainder, pending the happening of the contingency.[3] Coke adopted the same view[4]—the more readily, perhaps, because it made for the destructibility of contingent remainders, and the frustration of attempts to create perpetuities by their means;[5] and this, the historic view, though dissented from by Fearne,[6] commanded the assent of Preston.[7]

[1] §§ 645, 646. [2] § 647.

[3] "And as to what has been said, that the remainder did not pass out of the lessor presently by the livery, sir, I absolutely deny this, for it passed out of the lessor, although it did not vest in the defendant until the death of William, and it was in abeyance until the performance of the condition, in respect of the possibility that it might be performed," *per* Mountague, C.J., at p. 35.

[4] Co. Litt. 342b.

[5] That this view made for the destruction of contingent remainders was clearly pointed out by Parker, L.C., in Carter v. Barnardiston (1720) 1 P. Wms. at pp. 516-517; as Preston said, Fearne's view that the grantor retains the fee is inconsistent with "the rules which require that every contingent remainder should be preceded by a vested estate of freehold, created by the same deed or instrument; and that the contingent remainder must either vest or fail of effect before the determination of the estates of freehold by which the remainder is preceded"; for these rules "are all founded on principles which assume that the inheritance is in contingency, as well against the donor as against the person to whom the contingent remainder is limited," Abstracts ii 105; in his view, the grantor retained, not an estate, but a mere possibility of reverter, ibid ii 106-107.

[6] Contingent Remainders (9th ed.) 360-364; at pp. 363-364 he thus sums up his argument:—"To bring this doctrine to the test of common reason we may state it thus: A man makes a disposition of a remainder or future interest, which is to take no effect at all until a future event or contingency happens; it is admitted that no interest passes by such a disposition to anybody, before the event referred to takes place. The question is, what becomes of the intermediate reversionary interest, from the time of making such future dispositions until it takes effect? It was in the grantor or testator at the time of making such disposition; it is confessedly not included in it. The natural conclusion seems to be, that it remains where it was, viz., in the grantor or testator and his heirs, for want of being departed with it to anybody else."

[7] Preston, Abstracts ii 101-107; his view is that Fearne's opinion is based "on natural reason and not on authority"; and for this opinion he gives very good reasons; for the rule applicable in the case of limitations which took effect by way of shifting uses see below 138-141.

The practical importance of these principles tended to increase, when the courts admitted the legality of contingent remainders which depended upon other contingencies than the death of a living person. The admission of the legality of such contingent remainders was, however, by no means a matter of course; for the admission of any kind of contingent remainder was a departure from the principles of the law as laid down by Littleton.[1] It was on that account regarded by conservative lawyers in the light of an exception which ought not to be extended. From this two results followed. In the first place, the legality of contingent remainders, which depended upon other contingencies than the death of a living person, was only gradually admitted. In the second place, the courts were careful to control strictly the nature and character of the contingencies upon which these remainders were allowed to depend.

(i) The fact that the legality of contingent remainders, which depended upon other contingencies than the death of a living person, was only gradually admitted can be seen from a Year Book case of 1536,[2] and from the course of the argument in *Colthirst v. Bejushin* in 1551.[3] In the Year Book case a grant was made by fine to A in tail, on condition that A and his heirs carried the grantor's standard when he went to battle, and, if the grantee or his heirs failed to do so, the remainder was limited to a stranger. Fitzherbert, J., according to this report, was inclined to adopt Littleton's view that the remainder ought to be in the person to whom it was limited at the time that the livery of seisin was made; and seemed to consider that, as it was impossible that a remainder limited on such a condition could be in the remainderman when livery was made, it was void.[4] In *Colthirst v. Bejushin* [5] an estate had been limited to husband and wife for their lives, remainder to A their son for his life, and, if he died in the lifetime of the husband and wife, remainder to B, another of their sons, for his life. One of the arguments used against the validity of the contingent remainder to B, was, in effect, the denial of the validity of a contingent remainder, except in the single case of a remainder to the heirs of a living person. "There was," said serjeant Morgan,[6] "a maxim that when a remainder is appointed to one, he to whom it is appointed ought at that time to be a person able, and to have capacity to take the remainder, or else

[1] Vol. iii 135. [2] Y.B. 27 Hy. VIII. Mich. pl. 2 (p. 24).
[3] Plowden 21.
[4] "Si cesty a que etc. n'ad le remainder en luy devant le condicion enfreint, quand le condicion est enfreint, il n'aura ce, car si cest remainder ne prist effect sur livere, et passa a cesty que etc., il ne poit prendre effect per force del condicion enfreint, que est un chose fait apres le livere fait; mes le cas est bon d'estre avise."
[5] Plowden 21. [6] Ibid at pp. 27-28.

it shall be void. As if a lease is made to one for life, the remainder to J. S. in fee, who is then a monk professed, and afterwards he is deraigned, and after that the tenant for life dies, J. S. shall not have the remainder, because he was not a person able at the time of the remainder appointed to take it. So if a lease is made for life, the remainder to the Mayor and Commonalty of D. who have not then capacity to purchase lands, and afterwards they have capacity to purchase, and after that the tenant for life dies, the Mayor and Commonalty shall not take the remainder, *causa qua supra*. So if the remainder is limited to one whom the tenant for life shall name, and afterwards he names one, he shall never have the remainder *causa qua supra*. But if the remainder is limited to the right heirs of J. S., who is then alive, and he dies, and afterwards the tenant for life dies, the right heir of J. S. shall have it. And I have read in our books two causes thereof, one cause is, for that it shall be intended that J. S. is then dead, the other cause is, for that the law presumes that J. S. shall have an heir, whom it will appoint to take the remainder *nolens volens*, so that in respect of the certainty of an heir the remainder shall be good; but where it stands indifferent whether he, to whom the remainder is appointed, shall be a person able or not, then the remainder shall not be good."

But, by the middle of the sixteenth century, the courts had definitely decided to admit the validity of contingent remainders, which were dependent on contingencies other than that of the death of a living person. In the case of *Colthirst v. Bejushin* Mountague, C.J., stated that Fitzherbert, J., in the Year Book case of 27 Henry VIII., ultimately decided to hold the remainder good;[1] and the remainder in *Colthirst v. Bejushin* was held to be valid by the court. The death of the son A in the lifetime of the parents was held to be, not a condition of which only the donor could take advantage and which would put an end to the precedent estate, but a limitation which fixed the time when the remainder vested, leaving intact the precedent estate. "It is," said Hinde, J.,[2] "but a limitation and an explanation of the time when the remainder shall commence; and I do not see any cause or reason why I may not make a remainder to commence and

[1] "When I was at the bar, I was of counsel with one Mr. Melton, and the case was thus, that a fine was levied *sur grant et render* whereby the conusee granted and rendered to the conusor the tenements in tail upon condition that the conusor and his heirs of etc. should bear the standard of the conusee when he went to battle, and if the conusor or his heirs failed to do it, then the land should remain to a stranger; and I moved the case then to the court, and it was greatly wondered that the fine upon condition was then received: but Fitzherbert then held the remainder good, and they did not wonder at it, nor held it any great question but that it might commence upon condition," Plowden at p. 34.

[2] Ibid at p. 33.

vest in the midst of a particular estate, as well as I may at the beginning or end of a particular estate, for there is no repugnancy, but that it may commence to vest at any time during the particular estate; for when the fee simple is in me, I may condition with it as I please, if it be not contrary to law." With this reasoning Mountague, C.J., and the other judges agreed.

(ii) Though the validity of remainders dependent upon contingencies other than that of the death of the living person was thus admitted, the judges thought it necessary to lay down some rules as to the nature and character of the contingencies which they considered to be permissible. But we have seen that contingent remainders were not as yet common.[1] Authority was therefore scanty, and the principles upon which the courts acted were not clearly defined. The rules on this topic were consequently confused; and we shall see that the confused character of some of these rules has left its traces upon the modern law.[2] It would seem, however, that the rules, based on the character of the contingencies considered to be permissible by the courts, turned partly (*a*) on the illegal or impossible character of the contingent event, on the happening of which the remainder was to vest; and partly (*b*) on the uncertainty of the person in whom it was to vest.

(*a*) In *Colthirst v. Bejushin* it was laid down that "if the condition is to kill a man or the like, or upon a condition impossible, then the remainder shall not be good, for a condition unlawful or impossible is of no effect to gain anything by the doing of it in our law.[3]

Closely akin to this reason for the invalidity of certain contingent remainders was the reason based upon the repugnancy of the condition to the nature of the estate granted.[4] The leading instance of such a repugnant condition, which was destined in the future to have a large influence upon the law as to one of the conditions of the validity of a contingent remainder,[5] was the case of the projected settlement of Rickhill, J., upon which Littleton had commented.[6] Rickhill had conveyed his lands to his first,

[1] Vol. iv 441; above 82. [2] Below 98-99.

[3] Plowden at p. 34 *per* Mountague, C.J.

[4] "When a person has a lawful property in anything, he may give or convey away the same, where, when, and how he pleases, so that his intent be not against law or reason, nor repugnant in itself," ibid at p. 31 *per* Hales, J.; "if a gift in tail is made upon condition that, if the donee alien, it shall remain to another, this is repugnant, for, when he has aliened to a stranger, it is, contrary to the alienation, to remain over," ibid at pp. 34-35 *per* Mountague, C.J.

[5] Below 99-100, 206-209.

[6] §§ 720-723; vol. iii 135; another leading case relied on, more especially in Colthirst v. Bejushin, to illustrate a condition void for repugnancy was Plesington's Case (1383) Bellewe 101-102; in that case one granted a lease for life on condition that, if he (the lessor) granted over the reversion, the lessee should have the fee; the condition was held to be void as repugnant to the estate which the lessor still retained, so that his grant to another was upheld as against the lessee.

second and third sons successively in tail, "and because he would that none of his sons should alien or make warranty to bar or hurt the others that should be in remainder, etc., he causeth an indenture to be made to this effect, viz. that the lands and tenements were given to his eldest son upon such condition, that if the eldest son alien in fee, or in fee tail, etc., or if any of his sons alien etc., that then their estate should cease or be void, and that then the same lands and tenements immediately should remain to the second son, and to the heirs of his body begotten *et sic ultra*, the remainder to his other sons, and livery of seisin was made accordingly."[1]

We have seen that one of the reasons assigned by Littleton for the invalidity of this condition would, if literally accepted, have prevented the courts from admitting the validity of any contingent remainder whatsoever;[2] and we have seen that this reason was put forward, in the unsuccessful argument in *Colthirst v. Bejushin*, for the proposition that no contingent remainder was valid, except a contingent remainder to the heirs of a living person.[3] It had become clear that this reason could not be literally accepted; but another of Littleton's reasons did supply a principle upon which a certain class of contingencies could be held to be void on the ground of repugnancy to the estate originally granted. Littleton had pointed out that, if the eldest son did alien, the fee simple would, as the result of his alienation, vest in the alienee; the reversion would be discontinued; and the remainder must fail, because it had no estate of freehold to support it.[4] This reasoning was applied to a similar limitation in 1506;[5] and it was accepted as good law by the court in *Colthirst v. Bejushin*[6] in 1551. The reasons given by Littleton, and in these two later cases, were based upon the technical rules governing the limitations of remainders, and not upon the general principle that such restrictions upon alienation were undesirable. The technical reasons sufficed, so that there was no need to have recourse to this general principle of public policy. But these technical reasons did, in fact, show that conditions imposing such restrictions upon alienation were impossible at common law, because they were repugnant to the nature of the estate granted, just as a condition against alienation attached to a feoffment in fee simple was re-

[1] Litt. § 720.

[2] "Every remainder which beginneth by a deed, it behoveth that the remainder be in him to whom the remainder is entailed by force of the same deed, before the livery of seisin is made to him which shall have the freehold," § 721; vol. iii 135.

[3] Plowden 27-28; above 88.

[4] § 722; below 205-206.

[5] Y.B. 21 Hy. VII. Hil. pl. 12 *per* Kingsmil, J.

[6] Plowden 35 *per* Mountague, C.J., cited above 89 n. 4.

pugnant, and therefore legally impossible.[1] We shall see that when, in the latter half of the sixteenth century, the whole question of the validity of limitations restrictive of alienation assumed great importance, the idea that a condition, which would have this restrictive effect, could be held to be void on the ground of repugnancy to the nature of the estate granted, was given a large extension.[2] The idea of repugnancy supplied a technical reason for new applications of the old principle that restrictions on the freedom of alienation are contrary to public policy; and these new applications of the old principle became the parent of important rules regulating the conditions of the validity, both of contingent remainders, and other forms of future estates in the land.[3]

(*b*) The judges had also begun to draw some distinctions, based upon the degree of uncertainty as to the existence of the person to whom the remainder was limited. Thus in 1430 it was said that a remainder limited to a monk professed who was not capable of taking a grant, or to a person not in esse, was void.[4] But, when it became recognized that a remainder could be limited to the heirs of a living person, it was not possible to lay down this principle so clearly or absolutely as before; for a limitation to the heirs of a living person was a limitation to unascertained persons. How then could the rule and this newly established exception be reconciled? It would seem from a case of 1487 that a reconciliation was at first attempted, by drawing a distinction between a remainder to a person who was not and could not be in esse at the time of the grant, and a remainder to a person who, though not ascertained, was in all probability in existence at the time of the grant. Thus a remainder limited to the heirs of J. S., J. S. being a non-existent person, or to a non-existent corporation, was void; but a remainder limited to the heirs of J. S., J. S. being a living person, was good.[5] This distinction was, as we have seen, taken by serjeant Morgan in his argument in *Colthirst v. Bejushin;*[6] and, though no countenance was given to it by the judgments in that case, it was, as we shall see, taken up and developed by the judges of the latter part of the sixteenth century,[7] because it could be made to fit in with a

[1] Vol. iii 85. [2] Below 206-209. [3] Below 209-212.

[4] Y.B. 9 Hy. VI. Trin. pl. 19, p. 24 *per* Godred *arg.*

[5] "Et le remainder a les droits heirs de J at S cest bon, pur ce que il poit estre bon remainder per common entendement: mes si le Roy grant a un Abbe, et est nul tiel, le grant est void nienobstant q'il est fait apres. Et le cas des heirs de J at S, posito, quand le remainder est fait, que est nul J at S et apres un J at S est ne, c'est void nienobstant que J at S devie et ad heir al temps del remainder," Y.B. 2 Hy. VII. Hil. pl. 16 *per* Keble *arg.*

[6] Above 88. [7] Below 92 seqq.

new test of the validity of contingent remainders which they were elaborating.

(2) *The later developments.*

The uncertainty, which prevailed during the latter half of the sixteenth century, as to the effect of the statutes of Uses and Wills upon the powers of landowners to create future interests in their property,[1] and the desire of the landowners to create unbarrable entails,[2] raised a large number of difficult problems for the courts of common law. As the courts were inclined to hold that the validity of these future interests, created by way of use or by executory devise, should be tested, as far as possible, by the same standards as those applicable to reversions and remainders,[3] the conditions under which reversions and remainders were valid were restated and elaborated. Special attention was necessarily given to contingent remainders, partly because the shifting and springing uses and executory devises, by means of which the landowners tried to create unbarrable entails, were at first modelled upon them; and partly because their destructibility, the development of very strict conditions for their validity, and the application of all these rules, so far as possible, to these new future interests, seemed to the judges the best way of preventing the attempts of the landowners to create unbarrable entails. With the rules as to the destructibility of contingent remainders,[4] and with the manner in which these rules were applied to these new future interests in land,[5] I shall deal later. At this point I shall say something of the origins of the modern conditions of the validity of contingent remainders, which resulted from these new problems, which the judges were called on to face at the end of the sixteenth century.

In laying down conditions for the validity of contingent remainders the judges seem to have followed two connected lines of reasoning. In the first place, they attempted to develop the somewhat meagre authorities as to the kinds of uncertainty or contingency upon which a remainder could be made to depend. In the second place, they elaborated, and ultimately connected with this reasoning, the principle, which they had firmly established, that all limitations which fettered the power of a tenant in tail to bar the entail, and all limitations which created, by remainder use or otherwise, what would be in substance a perpetual freehold or an unbarrable entail, were void.

(i) We have seen that there are some indications, in the authorities of the late fifteenth and early sixteenth centuries, of a tendency to draw distinctions based upon the comparative degree of certainty or uncertainty of the contingency upon which the

[1] Below 118. [2] Below 125, 194. [3] Below 123-124.
[4] Below 104 seqq. [5] Below 125-129.

remainder was limited. Thus Keble in his argument in the Year Book case of 1487 states that the grant of a remainder to the heirs of J. S., a living person, was good "by common intendment," but that the grant of a remainder to the heirs of J. S., a non-existent person, was not.[1] Similarly, we have seen that, in *Colthirst v. Bejushin*, the unsuccessful argument for the plaintiff attempted to distinguish a remainder to the heirs of J. S., a living person, and remainders based on other contingencies, by reference to the comparative certainty of the contingency happening.[2] But these cases did not go very far; and they did not directly meet the problem, which was then pressing upon the judges, of devising some test which would rule out contingent remainders, which were being limited in such a way as to create what was in substance an unbarrable entail. Some more general test was wanted, which would more precisely define the kind of contingencies upon which contingent remainders could be limited, and define them in such a way that the creation of anything in the nature of an unbarrable entail would be rendered impossible. To supply this test, it occurred to the judges that they might apply to contingent remainders a distinction suggested by Popham, C.J., between a single or common possibility, and a double possibility or a possibility on a possibility.[3]

It would seem that the term "possibility" was used as a synonym for a condition or a contingency. It was used, for instance, in this sense by Fineux, C.J., in 1500, when he said that a gift to a man and a woman, both married to separate persons, and to the heirs of their two bodies, gave them an estate tail, because, if their respective wife and husband died, they might by possibility marry.[4] It would thus seem that, by a single or common possibility was meant a contingency which "by common intendment" the law would deem to be not too remote; and that, by a double possibility or a possibility on a possibility was meant a contingency which the law would deem to be too remote. There can be no doubt that this distinction met the need for generality in the test which the judges were seeking; but unfortunately it was so general and was capable of so many meanings, fanciful and otherwise, that, as a practical distinction, it was quite useless. If the instance given by Fineux was an instance of a

[1] Above 91 n. 5. [2] Above 88.

[3] Rector of Chedington's Case (1599) 1 Co. Rep. at f. 156b; see the passage cited below 94.

[4] "*Nota per Fineux, Chief Justice.* Si on don terres a un home qui est marie, et a un feme qui est mariee a auter home, et a les heirs de lour 2 corps engendres; c'est bon tail, pur ce qui il poit marier apres per possibilitie, i.e. apres la mort de feme l'home, et le baron feme. *Quod Rede concessit*, et ils sont seisis in tail maintenant pur cest cause," Y.B. 15 Hy. VII. Trin. pl. 16.

common or single possibility, it is clear that the words "common" or "single" were not being used in their ordinary meaning. The judges continued to use these words in this arbitrary way, with the result that this rule ceased to have any precise meaning whatever. This will be apparent, if we glance at one or two of the applications which were made of it by the judges of the sixteenth and early seventeenth centuries.[1] Let us take, in the first place, one or two applications of this doctrine which were not made with reference to contingent remainders.

In 1599, in *The Rector of Chedington's Case*, Popham, C.J., said that a lease "could not commence upon a contingent which depended upon another contingent: as here the lease to Thomas depends upon the contingent annexed to the demise made to William, and the lease to William upon the contingent annexed to the demise to Ralph."[2] In 1610, in *The Lord Stafford's Case*,[3] Coke said, "if a man grants an advowson or a rent etc., for years, upon condition that, if the lessee pays 10s. within one year, that he shall have for life, and if after the year he pays 20s., that he shall have the fee; the lessee pays the 10s. within the year, and after the year he pays the 20s. according to the condition, yet he shall have but for life, for the estate for life at the time of the grant was but in contingency, which is not a foundation upon which a greater [estate] can increase, for a possibility cannot increase upon a possibility." Coke lays it down in several places,[4] as a rule of construction,[5] that, though the possibility that a man and a woman both married shall marry one another after the death of their respective spouses is a single possibility, yet "if lands are given to a man and two women, then the law will not intend that he shall first marry the one and afterwards she whom he shall marry shall die, and that then he shall marry the other." From this he drew the conclusion that, in the first case, they had an estate tail, and in the second case a joint estate for life, with separate remainders in tail to their issue.[6] These last two illustrations make it clear that the line between what sorts of pos-

[1] On this subject see generally Gray, Perpetuities (2nd ed.) §§ 125-133; Sweet, Double Possibilities, L.Q.R. xxx 353, and Yale Law Journal xxvii 985-991; Williams, Real Property (22nd ed.) 370-371.

[2] 1 Co. Rep. at f. 156b.

[3] 8 Co. Rep. at f. 75a.

[4] Co. Litt. 25b, 184a; Lampet's Case (1613) 10 Co. Rep. at f. 50b; Blamford v. Blamford (1616) 3 Bulstr. at p. 108.

[5] That Coke was merely laying down a rule of construction is very clearly explained by Sweet, Yale Law Journal xxvii 988; the talk about possibilities is merely meant to be explanatory of the distinction drawn between the construction put upon these two different sets of limitations.

[6] "The truth is that the question in the case proposed by Lord Coke is purely a question of construction, and the rule stated by him is an instance of the willingness of judges in early days to adopt a benignant construction in order to give effect to the presumed intention of the parties," ibid.

sibility were double and therefore too remote, and what were single and not too remote, was very thin. In fact, as Coke himself admitted, these instances show that, if the prohibition against a double possibility were taken strictly and literally, "it would shake all common assurances." [1]

As applied more especially to contingent remainders, the doctrine was made to afford a test as to the kind of contingency upon which a remainder could be made to depend. But, it would seem from *Cholmley's Case*,[2] that it did little more than explain the existing decisions, that a remainder to the heirs of a non-existent person or to an non-existent corporation is invalid.[3] It was said in that case [4] that the possibility that a man might enter into religion and become professed, was "such a remote possibility, as shall not be intended by a common intendment to happen; but a possibility which shall make a remainder good ought to be a common possibility, and *potentia propinqua* as death, or death without issue, or coverture, or the like. And therefore, as the logician saith, *potentia est duplex remota et propinqua*." [5] And then, as illustrations of this proposition, the cases of the remainder to the non-existent corporation, and to the heirs of a non-existent person are cited. On the other hand, "the possibility of the death of one man before another is a common possibility." [6]

[1] "Coke move un auter matter en cest case sur Popham's opinion (in the Rector of Chedington's Case) que un possibilitie sur un possibilitie n'est bon, car icy en noster case est possibilitie sur un possibilitie . . . uncore semble que est bon, car si l'opinion de Popham serroit estre ley ceo voile: shaker les common assurances del terre; car si feffement soit fait al use d'un pur vie le remainder al son eigne fits en tayle, et pur default de tiel issue al 2nd fits, et tiel semble icy est un possibilitie sur un possibilitie, uncore est bon," Blandford v. Blandford (1613) 1 Rolle Rep. at p. 321; the impossibility of taking this supposed rule literally is illustrated very clearly by Preston, Abstracts i 128-129; he says, "suppose the gift to be to A for her life, and after her death then to such son, to be baptized by the name of C, as B shall have by a woman whom he shall marry, and who shall at her marriage be called by the name of C: in this instance there is a treble contingency. (1) There must be a marriage with a woman of a particular name. (2) She must have a son of the marriage. (3) The son must be baptized by a particular name. And yet no lawyer would hesitate to admit the validity of a remainder in these terms."

[2] (1597) 2 Co. Rep. 50; cp. Bacon's account of the decision in this case in his argument in Calvin's Case, Works (Ed. Spedding) vii 662-663.

[3] For the older decisions to this effect see above 91; though the court in Colthirst v. Bejushin did not assent to this view, it did not actually deny it; and it was upheld in Lane v. Cowper (1575) Moore 103, and in Cholmley's Case.

[4] At f. 51b.

[5] The fact that Coke uses the words *potentia propinqua* as equivalent to a common possibility shows that he is using the word *potentia remota* as equivalent to a double possibility; in fact, as we have seen, that was one of the meanings of that ambiguous phrase, though, as we shall see (below 100-101) it had another. No doubt, as Mr. Sweet says, Yale Law Journal xxvii 988, Coke means by the words *potentia duplex* that possibilities are of two kinds, and not a double possibility; but it is misleading to say that "there is not a word about a double possibility," for it is pretty clear from the context that by *potentia remota* Coke meant to indicate what he elsewhere calls a double possibility.

[6] Co. Litt. 378a.

It would seem, therefore, that the application of this doctrine to contingent remainders did not materially add to the existing law. Like the existing rules, it attempted to differentiate between valid and invalid contingent remainders by reference to the remoteness of the contingency on which they were based. In fact, it merely attempted to justify those rules by treating them as deductions from a theory expressed in terms which were at once ambiguous and misleading. Probably the reason why the judges accepted this theory was their wish to get some kind of broad principle upon which they could hold to be invalid, firstly, those contingencies which seemed to be contrary to public policy, and secondly, those which appeared likely to facilitate restrictions upon alienation. But, in fact, the rule which required the contingency on which a remainder was limited to be lawful in its character was sufficient to effect the first of these objects; and the rules applicable to the limitation of contingent remainders[1] prevented them, quite irrespective of the character of the contingency on which they were made to depend, from being able to be so used as to restrict alienation unduly. As we have seen, they must vest, if at all, before the termination of the particular estate, or at the same instant as it terminates. It follows, therefore, as Mr. Sweet has pointed out,[2] "that the nature of the contingency on which a remainder is limited to take effect is quite immaterial, for whether the event is almost a certainty or whether it is wildly improbable, the period within which it must happen is the same; if it happens at or before the determination of the particular estate the remainder takes effect, otherwise the remainder fails; but in neither case does the improbability or remoteness of the contingency postpone the vesting, or affect the alienability of the land." We shall see that it was this fear that contingent remainders might be used to facilitate undue restrictions upon alienation, which induced the courts to favour those rules of law which put it in the power of persons, holding vested interests under a settlement in which contingent remainders were limited, to destroy these contingent remainders.[3]

The fact that the character of the contingency upon which a remainder is limited to take effect was really immaterial, was beginning to be perceived during the latter part of the seventeenth century. We can perhaps see some indications of this fact in the case of *Snow v. Cutler* decided in 1666.[4] In that case a husband made a devise to the heir of his wife's body, when the heir should attain the age of fourteen. The husband then died without issue. The wife married again and had an heir of her body. One of

[1] Above 84-86.
[2] Yale Law Journal xxvii 989.
[3] Below 104 seqq.
[4] 1 Lev. 135.

the points taken against the validity of the devise was that it was bad, because it depended npon a double contingency, or a possibility on a possibility. But, apparently Kelyng, C.J., and Twysden, J., gave no countenance to this argument, and thought that, if it was an executory devise it was good, as it must take effect within the compass of an existing life. Clearly they laid stress, not upon the character of the contingency, but upon the time at which the estate must vest. We shall see, too, that the judges, about this time, sanctioned the device of creating trustees to preserve contingent remainders, to protect these remainders from extinction by the acts of the parties taking vested interests under the settlement;[1] and we can, I think, regard this change of attitude as due to a perception of the truth, that the rules regulating the limitations of remainders, were a sufficient safeguard against attempts to use them to restrict alienation unduly. No doubt the appreciation of the fact that the question whether a limitation was unduly restrictive of alienation should be determined by considering, not the character of the limitation, but the date at which it vested, was hastened by Lord Nottingham's decision in the *Duke of Norfolk's Case;*[2] for we shall see that that case established this principle, and made it the root principle of the modern rule against perpetuities.[3] Naturally in that case Nottingham ridiculed this application of the doctrine of double possibilities, because the whole of his argument was based on the thesis that it was not the character of the contingency, but the date at which it was made to vest, which was material in considering whether or not it was void as creating a perpetuity.[4] In the case of *Scattergood v. Edge*,[5] decided in 1698, both Treby, C.J., and Powell, J., showed that they had quite appreciated this truth; and the manner in which the courts of equity further increased the efficiency of the device of trustees to preserve contingent remainders, and thus made it practically impossible for parties having vested interests under a settlement to destroy the contingent remainders,[6] illustrates its progress. By the end of the

[1] Below 111-114.

[2] (1685) 2 Swanst. 454; for an account of this case see below 223-225; for the older idea see Pollexfen's argument in this case, Pollex. at p. 232-233.

[3] Below 225.

[4] "Nevertheless if a term be limited to one for life, with twenty several remainders for lives to other persons successively, who are all alive and in being, so that all the candles are lighted together, this is good enough, though it be a possibility upon a possibility. . . . To limit a possibility upon a possibility or a contingency upon a contingency is neither unnatural nor absurd; but the rule which is laid down to the contrary by Popham in *The Rector of Chedington's Case* looks like a reason of art, but hath nothing at all of true reason in it; and I have known that reason denied at law; and my lord Coke himself denied that rule when he was Chief Justice, as you shall find 13 Jac. B.R. *Blandford and Blandford's Case*," 2 Swanst. at pp. 458-459.

[5] 1 Salk. at pp. 229, 230.

[6] Below 113.

eighteenth century it was generally recognized by the common law judges. In 1787, in the case of *Roe v. Quartley*,[1] the argument based on the theory that a contingency or possibility could be too remote was, as Mr. Sweet has pointed out,[2] "treated by the court with polite contempt." Ashhurst, J., considered that the fact that the limitation must have vested on the death of two living persons, and that it might have been barred by the tenant in tail, was conclusive in favour of its validity.[3] In 1832, the Real Property Commissioners saw clearly enough that the character of the contingency upon which a remainder is made to depend, cannot render it objectionable on the ground that it is restrictive of alienation.[4] Lastly, in 1843, in the case of *Cole v. Sewell*,[5] Lord St. Leonards stated that the doctrine that a remainder might be objectionable, by reason of the remoteness of the contingency on which it depended, was no longer a rule of English law.[6]

At the present day, therefore, the application of the doctrine of double possibilities to determine the validity of the contingency on which a remainder is based, has disappeared, because it has been seen that it is not necessary, in order to prevent undue restraints on alienation, to differentiate in this way between different kinds of contingencies. The only instances given of this application of this exploded doctrine to remainders were, as we have seen, remainders limited to the heirs of a non-existent person or to a non-existent corporation.[7] We have seen, too, that these instances come from a period in the history of the law when it was doubtful whether any contingent remainder, except a remainder limited upon the contingency of the death of an existing person, was valid.[8] The objection to these remainders was

[1] 1 T.R. 630. [2] Remoteness of Terms and Powers, L.Q.R. xxx 75 n. 1.

[3] 1 T.R. at p. 634.

[4] Third Report (Parlt. Papers 1831-1832 vol. xxiii) 29; after citing Coke's illustrations in Cholmley's Case, above 95, the Commissioners say, "this has nothing *restrictive of alienation* in it, since both the common and double possibility must have taken effect, if at all, upon the determination of the particular estate."

[5] 4 Dru. and War. 1.

[6] "It is now perfectly settled, that when a limitation is to take effect as a remainder, remoteness is out of the question. . . . There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule . . . was not known, so that while contingent remainders were the only species of executory estate then known . . . the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises as to remoteness; for if a limitation . . . is a remainder, it must take effect, if at all, upon the determination of the preceding estate. . . . The event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail or not according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness," ibid at pp. 28-29.

[7] Above 91. [8] Above 88.

based essentially on the character of the contingency. Preston saw that the objection could not be based on this supposed application of the doctrine of double possibilities, which he denounced as "quaint and unintelligible";[1] but he thought that it might be justified on the ground that, being gifts to a non-existent person or body, they were void for want of capacity or certainty. But, though this view has been followed by some writers,[2] it is obvious that it is hardly logical; for a gift to the heirs of J. S., a living person, may be as much a gift to a non-existent person, as a gift to the heirs of J. S., a non-existent person—a truth which was perceived by the Real Property Commissioners.[3] It is clear, therefore, that the a priori grounds upon which Preston and others support these rules are untenable; and, since they are clearly based upon essentially the same principle as this application of the doctrine of double possibilities was based, i.e. the character of the contingency, and as the character of the contingency is now admitted to be no bar to the validity of a contingent remainder,[4] they are logically indefensible, and should not be regarded as law.

But the application of the doctrine of double possibilities, to determine the validity of a contingency by reference to its character, was not the only application of this doctrine. We shall now see that the doctrine was capable of being applied to the rules which the judges were establishing to prevent the creation of a perpetual freehold or an unbarrable entail.

(ii) We have seen that Littleton's animadversions on the settlement of Mr. Justice Rickill were, to some extent, based on the theory that a contingent remainder, limited to take effect on any attempted alienation of an estate tail, was void, because it was repugnant to the nature of the estate granted.[5] We shall see that, in the latter part of the sixteenth century and later, the landowners were constantly attempting to create unbarrable entails, both by limiting a succession of life estates,[6] and by attempting to restrain tenants in tail from barring the entail.[7] The courts had no difficulty in holding that attempts to effect this object, by means of contingent remainders to a succession of life tenants, were void, because these attempts to create perpetual

[1] Abstracts i 128.

[2] Fearne, Contingent Remainders (9th ed.) 250-251; Gray, Perpetuities (2nd ed.) § 131; Challis, Real Property (3rd ed.) 116.

[3] Above 98 n. 4.

[4] Above 98.

[5] Above 90; Fearne, Contingent Remainders 252-258.

[6] Perrot's Case (1594) Moore at p. 371; Chudleigh's Case (1589-1595) 1 Co. Rep. at f. 138a *per* Popham, C.J.; below 209-210.

[7] Corbet's Case (1600) 1 Co. Rep. 83b; Mildmay's Case (1606) 6 Co. Rep. 40a; Mary Portington's Case (1614) 10 Co. Rep. 35b; below 205-207; and see generally Sweet, Perpetuities, L.Q.R. xv 72-74.

freeholds were substantially similar in character to attempts to fetter a tenant in tail from suffering a recovery.[1] They were therefore repugnant to the nature of the estate granted, and so fell within the ratio decidendi of Littleton's criticisms of Rickill's projected settlement.[2] As settlements of this kind were void if made by means of contingent remainders, they held that they were no less void if made by way of shifting or springing uses or executory devises.[3] We shall see that all these devices, which tended to create a "perpetuity," i.e. to create an unbarrable entail or a perpetual freehold, were therefore held to be void.[4]

But, just as certain of the older rules as to the validity of contingent remainders, based on the nature of the contingency, were treated merely as illustrations of the rule against double possibilities; so these rules, directed against a perpetuity, came to be partially disguised under another application of that unfortunate doctrine. We have seen that, in one of the many statements of that doctrine, it was said that a lease could not commence, "upon a contingent which depended upon another contingent";[5] and that, in another, it was said that an estate for life in contingency was "not a foundation upon which a greater can increase, for a possibility cannot increase upon a possibility."[6] We shall see that these statements were used as large premises to help to establish the principle, that executory interests, which were so limited that they might vest at too remote a period, were invalid;[7] and, later, to justify the concrete rule, invented to avoid the creation of a perpetual freehold, that, after an estate for life to an unborn person, a contingent remainder cannot be limited to that

[1] Sweet, Perpetuities, L.Q.R. xv 72-74.

[2] Corbet's Case (1600) 1 Co. Rep. at f. 84a; at f. 88a Glanville, J., said, "that Rickill who was a judge in the time of Rich. II. and Thirning who was Chief Justice of the Common Pleas in the time of Hen. IV. intended to have made perpetuities, and, upon forfeiture of the estate tail of one of their sons, to have given the remainder and entry to another, but such remainders were utterly void and against the law." So Bacon said in his argument in Chudleigh's Case, Works (Ed. Spedding) vii 623, "Mr. Rickill, whom Littleton calls his master, made a perpetuity of an estate in possession, of which many at this time no doubt do the like, et in hoc discipulus fuit supra magistrum." For Rickill's settlement see above 89-90.

[3] "And the makers of all the statutes concerning uses . . . have made uses to imi ate and resemble estates in possession, and to be guided and directed according to the rules and reason of the common law," 1 Co. Rep. at f. 88a; Chudleigh's Case (1589-1595) 1 Co. Rep. at f. 138a; below 123-124.

[4] Below 205-211. [5] Above 94. [6] Above 94.

[7] Bennet v. Lewknor (1617) 1 Rolle Rep. at p. 357 *per* Finch, *arg.*; Child v. Baylie (1620) Cro. Jac. at p. 461 *per* Crew and Croke *arg.*; see these passages cited below 212 n. 7; as Gray points out, Perpetuities (2nd ed.) 125 n. 2, in the report of Child v. Baylie in 2 Rolle 129, 130, the objection on the score of a possibility on a possibility looks rather to the remoteness or improbability of the contingency (for this meaning see above 92-93), and not to remoteness in vesting; but in the report in Croke it clearly has the latter meaning, though no doubt in the arguments of counsel the two meanings tended to shade off into one another.

unborn person's children.[1] We shall see, too, that it has been suggested that they also justify the rule that a contingent remainder cannot be made to depend upon the vesting of a preceding contingent remainder.[2] It is clear that this application of the doctrine of double possibilities is directed, not against the character of the contingency upon which the remainder is made to depend, but upon the date at which it is made to vest. It was, therefore, very much better calculated to secure the prevention of undue restrictions upon alienation, than rules based upon the character of the contingency upon which the remainder is made to depend. For this reason it has played some part in the evolution of the modern rules, which are directed against the limitation of estates in such a way that their vesting is postponed to too remote a date. I shall therefore consider the history of these rules, directed to prevent the creation of an unbarrable entail, or a perpetual freehold, and the application of this doctrine of double possibilities to these rules, in connection with the rules against perpetuities. We shall see that these rules, which were applicable in the first instance to the creation of future interests in real property, were supplemented by a modern rule applicable to many other kinds of future interests, both in realty and personalty. We shall see that the development of both these sets of rules has proceeded on parallel lines; that, in the course of their respective developments, they have influenced one another; and that in modern law they are still intimately related.[3]

At this point we must return to the subject of contingent remainders. By the end of the sixteenth century the validity of remainders dependent upon many contingencies, besides the death of a living person, had been recognized. If they complied with the conditions which regulated the limitation of remainders, if in the opinion of the court the contingency on which they were limited was not too remote, and if they were not so limited as to create an unbarrable entail or a perpetual freehold, their validity was unquestionable. The question now arises, what was the nature of the interest conferred by them?

The Nature of the Interest Conferred by a Contingent Remainder

So long as the only form of contingent remainder allowed by the law was a remainder to the heirs of a living person, it is clear that it could not be regarded as anything in the nature of an

[1] Chapman v. Brown (1765) 3 Burr. at pp. 1634, 1635; Whitby v. Mitchell (1889) 42 C.D. at pp. 501-502; S.C. 44 C.D. at pp. 89, 92; cp. L.Q.R. xxv 394; Yale Law Journal xxvii 986-987; below 212-214.

[2] Below 213.

[3] Below 231 seqq.

estate in the land. Such a limitation merely created a possibility that an estate in the land might arise at some future date, in favour of some as yet unascertained person. Seeing that the person to take was unascertained, such an interest was in the nature of an absolutely bare possibility.[1] The person entitled, therefore, could not even release his right, for, strictly speaking, he had no right at all. There was only a possibility that a right might arise; and the authority of Littleton could be cited for the proposition that, in such a case, no release was possible.[2] Such a possibility was indeed descendible to the heir of the prepositus; for it was limited in terms to the heirs of a living person, so that if his heir apparent at the time of the limitation died, it necessarily vested, when he died, in the person who was then his heir.[3] But this was about the only characteristic of an estate in the land that it possessed.

Somewhat different considerations arose when other varieties of contingent remainders were permitted. It might well be that a remainder was contingent, and yet that it was limited to an ascertained person. For instance, there might be a limitation to A for life, remainder to B for life, and if B die in the lifetime of A, to C, a living person, in fee simple. In cases such as these there is an ascertained person C, who will get a vested remainder in the event of B's death in A's lifetime. The question therefore arose, What interest if any did he take, pending the happening of the contingency? At first the judges were not disposed to relax their rules; and so they held that no contingent remainder was alienable, either *inter vivos* or by will. Moreover, it became apparent that some of these contingent remainders were not even descendible. If, for instance, an estate for life was given to A, remainder to J.S. and his heirs, provided that J.S. shall return from Rome in A's lifetime, if J.S. did not return from Rome in A's lifetime, the whole remainder failed.[4] But the judges based their reasons upon somewhat divergent grounds; and some of

[1] For the distinction between absolutely bare possibilities, bare possibilities, and possibilities coupled with an interest, see Challis, Real Property (3rd ed.) 76 n.

[2] "If there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor, all the right which he hath or may have in the same tenements, without clause of warranty, etc., and after the father dieth, etc., the son may lawfully enter upon the possession of the disseisor, for that he had no right in the land in his father's life, but the right descended to him after the release made by the death of his father," § 446.

[3] Weale v. Lower (1672) Pollexfen at pp. 59, 60; Fearne, Contingent Remainders 365-366.

[4] See Smith v. Packhurst (1745) 3 Atk. at p. 139 *per* Willes, C.J.; cp. Moorhouse v. Wainhouse (1767) 1 W. Black 638; they are cases in which, as Fearne says (op. cit. 364-365), "the existence of the devisee of the contingent interest at some particular time, may by implication enter and make part of the contingency itself, upon which such interest is intended to take effect."

these grounds led the courts to make some modifications in the older rules.

It would seem from *Lampet's Case*,[1] that the prohibition against alienation *inter vivos* was based partly upon that nervous dread of the evils of maintenance, which the disordered state of the country in the fifteenth century had firmly imprinted in the common law;[2] partly on the feeling that a permission to alienate would complicate titles;[3] and partly, perhaps, on the idea that to permit alienation would give a more definite character to these interests, which would compromise their destructibility, and so render the creation of a perpetuity more possible by their means.[4] It was probably on these grounds that it was held that they were not alienable *inter vivos;* and, by a narrow construction of Henry VIII.'s statutes of Wills,[5] that they were not devisable.[6] But these grounds for denying the alienability of these interests, *inter vivos* or by will, naturally led the courts to acquiesce in allowing the persons entitled to these possibilities to destroy them. Therefore it was held, at the end of the sixteenth and the beginning of the seventeenth centuries, that the person entitled could release them to the freeholder or vested remainderman,[7] or could bar them by levying a fine.[8]

In the eighteenth century it was becoming apparent that the rules relating to the limitation of contingent remainders were so strict, that there was not much danger that a perpetuity could be created by their means;[9] and the court of Chancery had not inherited the somewhat unreasoning dread of maintenance which still clung to the common law courts. On this account the common law courts revised their construction of Henry VIII.'s

[1] (1613) 10 Co. Rep. at f. 48a—"And first was observed the great wisdom and policy of the sages and founders of the law who have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppressions to the people, and chiefly of terre tenants, and the subversion of the due and equal execution of justice."

[2] Vol. ii 416; vol. iii 395-400; above 50-51; below 523-527.

[3] Above n. 1.

[4] Below 217.

[5] Jones v. Roe (1789) 3 T.R. at p. 95 *per* Ashhurst, J.; Fearne, Contingent Remainders 367, says, "the opinion of contingent remainders not being devisable seems to have arisen from too narrow a construction of the word 'having' in the Statute of Wills, by understanding that word as 'seised of' . . . which predicament, not being applicable to estates before they are vested, would, if requisite to the power of testamentary disposition, have ranked them, in that respect, with estates not acquired till after the time of the will"; he points out that contingent interests in personalty could always pass by will.

[6] Bishop v. Fontaine (1696) 3 Lev. 427; Lord Hardwicke, C., seems to have recognized that they were not devisable, Fearne, op. cit. 376.

[7] Lampet's Case (1613) 10 Co. Rep. at ff. 48a, 48b.

[8] Powle v. Veare (1599) Moore 554; Weale v. Lower (1672) Pollexfen 54; it would seem however that, indirectly, they might be conveyed by a fine operating by way of estoppel, and perhaps by a common recovery, Sanders, Uses (5th ed.) ii 34.

[9] Above 97; below 111.

statutes of Wills,[1] and permitted a devise of such contingent remainders "as would be descendible to the heir of the object of them dying before the contingency or event on which the vesting or acquisition of the estate depended"; [2] and the court of Chancery specifically enforced agreements for value to assign all kinds of contingent interests.[3] These interests are now devisable under the Wills Act of 1837,[4] and assignable by deed *inter vivos* by virtue of the provisions of the Real Property Act, 1845.[5] They are not indeed existing estates in the land; but they have ceased to be bare possibilities,[6] and have become possibilities coupled with an interest.

It is thus apparent that the nature of the interest conferred by a contingent remainder was originally an interest of a most precarious kind; and that it was deliberately made more precarious by the judges of the sixteenth and seventeenth centuries. Hence the variety of the ways in which it could be destroyed has always been one of its most characteristic features. To this feature we must now turn.

The Destructibility of a Contingent Remainder

The various ways in which a contingent remainder was liable to be destroyed depend, firstly, on the rules regulating the limitation of remainders; and, secondly, on the common law principles as to seisin and disseisin, and as to merger. The rules regulating the limitation of remainders rendered a contingent remainder liable to fail irrespective of the wish of any of the parties to a settlement. The legal principles regulating seisin and disseisin and merger put it into the power of one or more of the parties to the settlement to destroy the contingent remainders limited by that settlement. A contingent remainder, therefore, was an extremely precarious interest. But, in the latter half of the seventeenth century, the conveyancers invented the expedient of trustees to preserve contingent remainders, in order to take away from the parties to a settlement the power to destroy the contingent remainders limited therein. At the end of that century, and at the beginning of the eighteenth century, the courts upheld the validity of this expedient, and even helped to render it more efficacious. The Legislature in the nineteenth century,

[1] Roe v. Jones (1788) 1 Hy. Bl. 30; S.C. affirmed on a writ of error, 3 T.R. 88.
[2] Fearne, Contingent Remainders 370; above 103 n. 5.
[3] Hobson v. Trevor (1723) 2 P. Wms. 191; Fearne, op. cit. 550; Williams, Real Property (22nd ed.) 373.
[4] 7 William IV. and 1 Victoria c. 26 § 3. [5] 8, 9 Victoria c. 106 § 6.
[6] At the present day the assignment even of these, if for value, will be upheld by equity, Tailby v. Official Receiver (1888) 13 A.C. at p. 543; Re Ellenborough [1903] 1 Ch. 697.

accepted the law as thus developed, and, in order to simplify it, took away from the parties to a settlement their former power to destroy the contingent remainders. Later, it modified the rules regulating the limitation of remainders, in order to render them less liable to destruction from causes operating irrespective of the wish of the parties to a settlement, without entirely removing their liability to destruction from this cause.

In dealing with this subject therefore, I shall discuss, firstly, the cause arising from the rules regulating the limitation of remainders; secondly, the causes arising from the law as to seisin and disseisin and as to merger; and, thirdly, the history of the manner in which the destructibility of contingent remainders has been removed or modified.

(1) *The cause arising from the rules regulating the limitation of remainders.*—We have seen that, from the earliest times, a contingent remainder was only allowed to take effect if it became vested during the duration of the precedent estate or at the same instant as that estate determined; because, if the rule had been otherwise, the freehold would in effect have been limited in futuro, and, pending the contingency, would have been in abeyance.[1] This rule was the more rigidly adhered to because, as we have seen,[2] the judges soon perceived that adherence to it was a principal safeguard against the creation of a perpetuity by means of contingent remainders.[3] How rigidly they adhered to it is illustrated by the case of *Biggot v. Smyth.*[4] In that case a man seised in fee made a feoffment to the use of himself and his wife for life, and then to the use of the heirs of the survivor of them. Thus, by the operation of the rule in *Shelley's Case*,[5] the husband and wife took an estate for life, with a contingent remainder in fee to the survivor of them. The husband then made a tortious feoffment of the land. This destroyed the life estate belonging to himself; and, during the coverture, the wife, thus disseised, had no right of entry. After her husband's death she entered, and then died. We shall see that, if the estate of the tenant of the precedent estate of freehold was thus destroyed, and another person, having a vested estate preceding the estate of the contingent remainderman, got thereby a right of entry, this right of entry was a sufficient estate to support the contingent remainder.[6] It was therefore argued in this case that, as the wife got her right of entry and her contingent remainder in fee at the same time, the contingent remainder in fee was saved. But it was held that

[1] Vol. iii 134-136; above 84-85. [2] Above 96.
[3] For statements of this principle see Chudleigh's Case (1589-1595) 1 Co. Rep. at ff. 130a, 138a.
[4] (1628) Cro. Car. 102. [5] Vol. iii 107-109.
[6] Below 108.

it was not, as, during the interval between the feoffment and the death of the husband, the contingent remainder was supported neither by an estate of freehold nor by a right of entry. Therefore, at the time when the contingent remainder in fee vested in the wife, there was nothing to support it. Holt, C.J., commenting upon this case,[1] said that it was "nice to an instant, for the right ought to be precedent to support the contingency; and therefore there, because the right arose to the wife *eo instanti* that the contingency happened, the remainder was adjudged to be destroyed; and the case has always been held for law."

This being the law, it is not strange that the courts should have held, in the case of *Reeve v. Long*,[2] that, if land was devised to A for life, remainder to his son, remainder over, and A died leaving a child *en ventre sa mere*, the posthumous son could not take, and the estate vested instantly in the next vested remainderman. It was argued, indeed, in that case that these limitations must take effect by way of executory devise, because, to hold that they took effect by way of contingent remainder, "would be to disinherit an heir upon a nicety, against the plain intention of the testator."[3] This was a hopeless argument, because, as we shall see, the rule was well established that every set of limitations which could by possibility be construed as a contingent remainder must, irrespective of the intentions of the parties, be so construed.[4] Nevertheless this decision was reversed by the House of Lords, contrary to the unanimous opinion of the judges, on the ground that it must be construed as an executory devise, in order that the testator's intention might not be defeated.[5] Sir Bartholomew Shower, one of the appellant's counsel, admitted that, if the limitation was a contingent remainder, he had no case;[6] and the respondent's counsel had little difficulty in showing that the other side had "argued against two as known principles as any in law."

[1] Thompson v. Leach (1696) 1 Ld. Raym. at p. 316; S.C. 12 Mod. at p. 175 he is reported as saying that, "during the coverture she had no right of entry or action, but the husband had the power of the whole estate; and though her estate and the contingency happened and started up together *eo instnti*, yet this was not sufficient, because the particular estate that should support the contingency ought to be precedent"; cp. Fearne, Contingent Remainders (9th ed.) 288. It would thus seem that, though it is sufficient if the contingent remainder vests *eo instanti* that the particular estate determines, it is not sufficient if the particular estate only arises *eo instanti* that the contingent remainder vests.

[2] (1695) 3 Lev. 408; S.C. 1 Salk. 227; 4 Mod. 282.

[3] Ibid at p. 283.

[4] Below 126-128.

[5] "The judgment was reversed by almost all the Lords in Parliament, because, it being a will, they construed it according to the intent and equity and meaning of the parties, which they said could never be to disinherit the heir of the name and family of the devisor, nor would they do it on such a nicety. But all the judges were much dissatisfied with this judgment of the Lords, nor did they change their opinions thereupon," 3 Lev. at p. 408.

[6] House of Lords MSS. (N.S.) i 398 no. 851.

Naturally the decision of the House of Lords was regarded with considerable distrust.[1] Settlors showed little disposition to rely on it; and prudent conveyancers generally inserted in a marriage settlement a limitation to the (intended) wife, if she should be enceinte at the death of the husband, and her assigns, till the birth of a posthumous child.[2] We shall see that this distrust occasioned the enactment of the first statute passed to remedy the destructibility of contingent remainders.[3]

(2) *The causes arising from the law as to seisin and disseisin, and as to merger.*—It was because a contingent remainder was not an estate in the land, but only a possibility that an estate might arise,[4] that these two branches of the law operated to give to persons entitled to vested estates in the land, large powers to destroy the contingent remainders.

We have seen that conveyances by way of feoffment fine and recovery were capable of a "tortious operation." That is, a tenant for life or other person seised or possessed of a limited estate in the land, could convey to another a tortious fee simple. The result of this conveyance was to defeat the estate of the person conveying, and to substitute therefor a new estate. If, therefore, A was tenant for life, remainder to his unborn son, and A enfeoffed X in fee simple, A's estate was devested, the contingent remainder was no longer supported by any estate of freehold, and it therefore failed. A contingent remainder immediately dependent upon an estate of freehold thus devested was therefore wholly destroyed.[5] But this result would not necessarily follow, if the contingent remainder was not immediately dependent upon the estate of freehold thus devested. This followed from the

[1] Above 106 n. 5; Challis, Real Property (3rd ed.) 140. On the other hand, Lord Loughborough pointed out in Thellusson v. Woodford (1798) 4 Ves. at p. 342 that Reeve v. Long was "the decision of Lord Somers; and that was not the only case in which he stood against the majority of the judges"; and that the statute of 10 William III. c. 22, below 115, was not to remove doubts as to that decision, but to apply the same law to deeds as it applied to wills.

[2] Challis, loc. cit. 140 n. [3] Below 115. [4] Above 102.

[5] "By the feoffment of the tenants for life, their estate was determined, and title of entry given for the forfeiture, and then those in the future remainder were not *in esse* to take it; for this reason, these remainders *in futuro*, by this matter *ex post facto*, were utterly destroyed and made void; and there is no difference when the estate of the tenant for life determines by the death of the tenant for life, and when it determines in right by his forfeiture; for, in both cases, entry is given to him in the next remainder, and then, if he cannot take the land when the particular estate determines, the remainder is void," Chudleigh's Case (1589-1595) 1 Co. Rep. at f. 135b; "It was agreed *per totam curiam* that by the feoffment of the tenant for life the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate, or, at least *eo instanti* that it determines; for if the particular estate be ended or determined in fact, or in law, before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed," Archer's Case (1598) 1 Co. Rep. at f. 66b.

rule that, if the tenant of the estate upon which the contingent remainder was dependent had a right of entry, that right of entry would support the contingent remainder. Thus suppose that A is tenant for life, remainder to his unborn son, and that X has disseised A, A has a right of entry which will support the contingent remainder to the unborn son.[1] If, therefore, there was a limitation to A for life, remainder to his first son who was already born, remainder to B for life, remainder to B's unborn son, and A made a feoffment in fee, his son got a right of entry; and it was held that this right of entry supported the contingent remainder to B's son.[2] It was, however, only a right of entry which would thus support a contingent remainder—a mere right of action would not support it.[3] But we have seen that in certain events a tenant lost his right of entry, and was driven to his real action.[4] His estate was then said to be not devested, but discontinued. Thus a feoffment in fee by a tenant in tail discontinued the estate tail, and destroyed all the contingent remainders depending upon it. Similarly, if A the tenant for life was disseised, and the disseisor died, and the land descended to his heir who occupied it for five years, this descent cast operated as a discontinuance, and destroyed the contingent remainders limited upon A's life estate.[5]

Thus a tortious conveyance by feoffment fine or recovery, made by a tenant for life, devested the remainders dependent upon that life estate; but it gave a right of entry to the next vested remainderman; and that right of entry would support the contingent remainders dependent upon that remainderman's estate. But if such a conveyance was made by a tenant in tail, or (it would seem) if, after such a conveyance had been made by a tenant for life, a descent had been cast, so that the right of entry was lost, in both these cases all the contingent remainders disappeared. It is clear, therefore, that, by the operation of the law as to seisin and disseisin, a forfeiture incurred by the tenant

[1] "If the tenant for life had been disseised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been revested. . . . But it is otherwise in the case at the Bar (when the tenant for life had made a tortious feoffment) for by his feoffment no right of the particular estate doth remain," Archer's Case (1598) 1 Co. Rep. at ff. 66b, 67a.

[2] Lloyd v. Brooking (1672) 1 Vent. 188; Fearne, op. cit. 323.

[3] Thompson v. Leach (1697) 12 Mod. at p. 174 *per* Holt, C.J., cited below n. 5.

[4] Vol. ii 583-585; vol. iii. 93; above 21.

[5] "A right of entry will, though a right of action will not, support a contingent remainder: as if there be tenant for life, with a contingent remainder over, and tenant for life be disseised, the whole estate is devested, but the right of entry in the tenant for life shall support the contingent remainder: but if tenant for life be disseised, and a contingent remainder expectant upon his estate, does not vest before a descent is cast, then it is gone, because it is turned into a right of action," Thompson v. Leach (1697) 12 Mod. at p. 174 *per* Holt, C.J.

for life, as the result of a tortious conveyance, destroyed the contingent remainders dependent upon that estate; and the same result followed as the result of a forfeiture incurred for any other cause.[1]

The operation of the law of merger likewise destroyed a contingent remainder. Thus, in the case of *Purefoy v. Rogers*,[2] a married woman was tenant for life, remainder to her son if one should be born. The reversioner in fee, before the birth of a son, conveyed his reversion to the wife and her husband. It was held that the wife's life estate was merged in the fee simple, and that the contingent remainders were therefore destroyed. The same result followed in the converse case, that is if the tenant of the particular estate surrendered his estate to the reversioner in fee or to a vested remainderman in fee. The case of *Thompson v. Leach*[3] is an illustration of the working of this rule. S. Leach was tenant for life, with contingent remainders in tail, remainder to Sir Simon Leach in tail, remainder in fee to N. Leach. Before the contingency happened, the tenant for life surrendered his estate to Sir Simon Leach. It was held that, but for the fact that the surrender was void because the tenant for life was a lunatic,[4] the contingent remainders would have been destroyed by this surrender.

In both these cases the law of merger was brought into operation to destroy the contingent remainder by the acts of the persons interested under the settlement. But that law might also come into operation quite irrespectively of the will of the parties. The manner in which this might happen has been so clearly explained by Challis that I cannot do better than copy his words. He says:[5] "It is possible either by descent, or by the operation of the rule in Shelley's Case, for the precedent estate and the next vested estate of inheritance to meet in the same person simultaneously with the creation of the precedent estate. If a testator seised in fee simple should devise lands to his eldest son for life, with remainder in tail male to the successive sons of the eldest son, and the will should contain no further limitations; then the estate for life and the next vested estate of inheritance (the reversion in fee simple upon the limitations contained in the will) would simultaneously be vested in the eldest son, the former by the will and the latter by descent. And if a settler should in a settlement insert limitations similar to those above supposed, and should further insert a limitation

[1] See Co. Litt. 251b, 252a; cp. Challis, Real Property (3rd ed.) 135-136.
[2] (1671) 2 Wms. Saunders 380; Fearne, op. cit. 318.
[3] (1691) 2 Vent. 198; S.C. 1 Ld. Raym. 313; 3 Mod. 296; 12 Mod. 173; Fearne, op. cit. 318.
[4] 3 Mod. 301.
[5] Real Property (3rd ed.) 137.

in fee simple to the eldest son's right heirs, the eldest son would, by the operation of the rule in Shelley's Case, simultaneously take an estate for life and the next vested estate of inheritance. And if the limitations in tail to the successive sons should, at the testator's death, or at the execution of the conveyance, be contingent . . . all such contingent remainders, if the law of merger were suffered to apply strictly, would have been destroyed at the moment at which the settlement first came into operation, thus to a great extent making the settlement nugatory in its inception."

In such cases as these the courts, at the end of the sixteenth and the beginning of the seventeenth centuries, admitted an exception from the strictly logical consequences of their legal principles. In *Archer's Case*,[1] for instance, land was devised to A for life, and then to the next heir male of A, and the heir male of the body of such next heir male. A was the heir at law of the testator, and therefore the fee descended upon him. Logically the descent of the fee upon him should have caused his estate for life to merge, and the settlement to be void ab initio. But the court held that he was only tenant for life, with a contingent remainder to his next heir male. Similarly, Coke lays it down[2] that, "if a feoffment in fee be made to the use of a man and his wife for the term of their lives, and after to the use of their next issue male to be begotten in tail, and after to the use of the husband and wife and the heirs of their two bodies begotten, they having no issue male at that time: In this case the husband and wife are tenants in special tail executed, and after they have issue a son, in this case they are become tenants for life, the remainder to the son in tail, the remainder to them in special tail." This principle was fully accepted by the courts. In 1678, in the case of *Purefoy v. Rogers*, it was stated clearly by Hale, C.J.[3] He said: "Where an estate *in esse* and a contingent remainder, with the remainder over to him who had the first estate *in esse*, are limited together by *one and the same* conveyance, there the remainder *in esse* is vested until the contingent remainder comes *in esse*, and then the estates shall be opened and disjoined by the letting in of the contingent remainder, because they were all created together by the same conveyance, and therefore the

[1] (1698) 1 Co. Rep. 66b; see Cordal's Case (1596) Cro. Eliza. 315; and cp. Fearne, op. cit. 342; Cordal's case also involved the question whether the possibility of the estate of inheritance opening to let in the contingent remainders deprived the wife of dower, as to this the authority of Cordal's case is questionable, see Fearne, op. cit. 346-347.

[2] Co. Litt. 28a; cp. Lewis Bowles's Case (1616) 11 Co. Rep. at f. 80a.

[3] 2 Wms. Saunders at p. 387; for a discussion as to the limitations of this principle, where the inheritance becomes united to the particular estate by descent, see Fearne, op. cit. 741-745.

estates shall be opened and closed as they are appointed by the original conveyance; but otherwise it is when the remainder *in esse* comes to the particular estate by any *grant or conveyance* made after the original conveyance, for there the contingent remainder will be destroyed."

If this exception to the operation of the doctrine of merger had not been admitted, the whole system of settling land by way of contingent remainders would have been rendered impossible; for we shall see that *Chudleigh's Case*[1] had decided that all contingent remainders, whether created at common law or by way of use, were equally liable to be destroyed by the application of these rules resulting from the law as to disseisin and the law as to merger.[2] The fact that the courts admitted this exception shows that the extension of these doctrines to remainders created by way of use, and the strict logic with which they applied them in other cases, was, as Lord Hardwicke pointed out, caused by their fear that these remainders would unduly restrict the freedom of alienation.[3] It was due to the same cause as that which led them to deny the validity of remainders limited upon remote possibilities;[4] and it rested upon the same fallacy. As we have seen, the rules which regulated the limitation of these remainders, and more particularly the rule which required them to become vested before or at the same instant as the particular estate determined, effectually prevented them from being so employed as to restrict unduly freedom of alienation.[5] We shall now see that it was probably the growing perception of this fact, which led the courts to uphold the validity of the device, invented by the conveyancers, for preventing the destruction of remainders by the strict application of these rules resulting from the law as to seisin and disseisin and the law as to merger.

(3) *The history of the manner in which the destructibility of contingent remainders has been removed or modified.*—I shall deal firstly with the causes arising from the law as to seisin and disseisin and as to merger, and secondly with the cause arising from the rules regulating the limitation of remainders.

(i) It is clear that the rules laid down in *Archer's Case*,[6] and *Chudleigh's Case*,[7] and elaborated by subsequent decisions, "left the interests of unborn children to whom estates were limited as purchasers nearly as unprotected as when the parents themselves took an estate tail."[8] Probably Lord Hardwicke was right when he said that the conveyancers began, shortly after these decisions,

[1] (1689-1695) 1 Co. Rep. 120a.
[2] Below 128.
[3] Garth v. Cotton (1753) Dickens at p. 193.
[4] Above 96.
[5] Above 84-86.
[6] (1598) 1 Co. Rep. 66b.
[7] (1589-1595) 1 Co. Rep. 128a.
[8] Davidson, Precedents in Conveyancing (2nd ed.) iii Pt. I. 204.

to devise some plan to avoid this result.[1] The plan, which proved to be efficacious, was to limit, after the estate to the tenant for life, an estate to trustees and their heirs during the life of the tenant for life, in case his estate determined by forfeiture or otherwise in his lifetime, in trust for him, and to preserve the contingent remainders. We can perhaps see the germ from which this device originated in the statement of Coke, in *Cholmley's Case*,[2] to the effect that a lease to A for life, remainder to B for the life of A, was good, "for by possibility the remainder may take effect; *scil.* if the tenant for life makes a feoffment in fee, or commits any forfeiture, he in remainder may enter for the forfeiture." However that may be, it is probable that this plan was perfected during the period of the Commonwealth by Sir Orlando Bridgman[3] and Sir Geoffrey Palmer; and it may be that the need for providing some protection against forfeitures for treason and delinquency quickened their inventive powers.[4] After the Restoration, "when those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use."[5]

The whole efficacy of this device depended upon the fact that this remainder to trustees was a vested remainder. "If they had taken a contingent estate, their estate would have been nothing but one more contingent remainder which would have been equally liable to destruction with the rest."[6] In 1697, in the case of *Duncomb v. Duncomb*, the court of Common Pleas held that the estate of the trustees was a vested estate;[7] and this decision as to the nature of the estate taken by the trustees, was finally held to be correct by the House of Lords in 1740 in the case of *Dormer v. Parkhurst*.[8] The decision was a necessary one

[1] "The intention of limitation to trustees to preserve contingent uses took its rise from the determination of two great cases reported by Lord Coke in his first volume, Chudleigh's Case, and Archer's Case; though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures for what was then called treason and delinquency was an additional motive to it," Garth v. Cotton (1753) Dickens at pp. 191-192 *per* Lord Hardwicke, C.

[2] (1597) 2 Co. Rep. at f. 51a; cp. Garth v. Cotton (1753) Dickens at p. 195.

[3] Limitations to trustees to preserve contingent remainders occur in a settlement in Bridgman's Precedents (2nd ed.) 85.

[4] Above n. 1.

[5] Bl. Comm. ii 172; but it would appear that it was not till the end of the seventeenth century that the modern form was quite fixed in its final shape; thus in Lloyd v. Brooking (1672) 1 Vent. at p. 189 it was said, "It hath been the most common way of conveyancing, to prevent the disappointing contingent estates, to make feoffments, etc., to the use of the husband etc. for life, remainder to the use of the feoffees for the life of the husband, and so on to contingent remainders; and the more modern ways have been to make the first estate but for years; but in both cases, he which hath the first estate cannot destroy the remainders."

[6] Challis, Real Property (3rd ed.) 144.

[7] 3 Lev. 437.

[8] 6 Bro. P.C. 351.

if the existing system of settlement was to be supported; and some have thought that the decision, like the decision in *Reeve v. Long*,[1] is contrary to principle, and rests upon considerations of expediency.[2] In favour of this view the following considerations may be urged: (i) The remainder to the trustees "depends entirely upon a contingent determination of the preceding estate itself," and so comes within the definition of a contingent remainder given by Fearne and Butler.[3] (ii) If we apply to the estate of the trustees the test, If the estate of the tenant for life were to determine now, could they take?[4] We cannot at once reply in the affirmative; because if the estate determined by the death of the tenant for life, they could not take. (iii) Coke would probably have considered such a remainder as contingent.[5] (iv) Considerations of expediency weighed strongly with the judges who advised the House of Lords.[6] On the other hand, both eminent conveyancers[7] and judges have supported the decision on principle; and, whatever may be thought of their reasons, there was no such consensus of professional opinion against the decision as there was against the decision in *Reeve v. Long*. In fact the consensus of opinion both at law and in equity was the other way. We have seen that the court of Common Pleas had taken this view in 1697;[8] and in 1698 the Legislature assumed that the device of trustees to preserve a contingent remainder was effectual[9]—an assumption which, as we have seen, necessarily presupposes that the remainder limited to them was a vested remainder.[10] The same view was taken by the court of Chancery; and that court materially increased the efficacy of this device by holding that, if the trustees assisted to destroy the remainders, it was "a plain breach of trust";[11] and that any one who took the land with notice of such a breach of trust would be bound to restore the estate.[12] If, therefore, the decision of the House of

[1] Above 106. [2] Challis, Real Property 144-146.

[3] Both Fearne and Butler seem to consider that a remainder having this characteristic is contingent, Fearne, op. cit. 5; Challis, op. cit. 145.

[4] See Fearne's definition, op. cit. 216, cited vol. iii 134.

[5] See Coke's statement in Cholmley's Case, above 112, in which he seems to assume that a remainder to B for the life of A is contingent because it is only "by possibility" that it may take effect.

[6] Below 114 n. 1.

[7] Challis points out, Real Property 144, that Fearne approved of this decision, and that Butler has expressed no disapprobation, though Josiah Smith thought that it was wrong in principle.

[8] Above 112. [9] 10 William III. c. 22, Preamble. [10] Above 112.

[11] Mansell v. Mansell (1732) 2 P. Wms. at p. 680; this view was first taken by the court of Chancery in 1710 in Pye v. Gorges 1 P. Wms. 128, where Harcourt, L.K., held that, if the trustees joined in a conveyance to destroy the remainders, he would hold them liable for breach of trust, and "that if there was no precedent in this case he would make one"; this was followed in 1713 in Tipping v. Piggot, 1 Eq. Cas. Ab. 385; and the decision in Mansell v. Mansell finally settled the question.

[12] See Garth v. Cotton (1753) Dickens at p. 200.

Lords was wrong in principle, it was, as the judges who advised the House of Lords said, eminently a case in which *communis error* should be allowed to make *jus*, because a contrary decision would have upset the whole of the existing system of settlement; for it would have made it possible for those having vested interests under settlements to disappoint the just expectations of settlors, and those entitled to contingent remainders under these settlements.[1]

The efficacy of this device for preventing the destructibility of contingent remainders made statutory interference unnecessary. This was probably the reason why a bill, introduced for the purpose of protecting contingent remaindermen from the tortious acts of the tenant for life, failed to pass in 1783.[2] But the changes made by the legislation of the first quarter of the nineteenth century rendered this interference desirable. The possibility of turning an estate to a mere right of action by a discontinuance had been got rid of in 1833.[3] Fines and recoveries had been abolished in the same year;[4] and when, by the Act of 1845, a feoffment ceased to have a tortious operation,[5] no form of conveyance remained by which a limited owner could convey a tortious fee. An Act of 1844, which abolished contingent remainders,[6] had provided that contingent remainders should take effect as executory interests; and had declared that existing contingent remainders should not fail or be destroyed by the destruction or merger of any preceding estate. But this Act, in so far as it abolished contingent remainders, was repealed by the Act of 1845; and it was provided that contingent remainders should be able to take effect "notwithstanding the determination by forfeiture surrender or merger of any preceding estate of freehold."[7] This removed the necessity for limiting an estate to

[1] Willes, C.J., delivering the opinion of the judges to the House of Lords in the case of Dormer v. Parkhurst, said, "But consider what would be the consequence, if the trustees do not take but upon a contingency, their heirs cannot take; and if the trustees die before the contingency happen, the limitation to their heirs fails; and if the estate limited here to the trustees is contingent, so are the limitations to trustees in all settlements, and consequently all the settlements for these 200 years, ever since the statute of uses, may be questioned. But can we conceive, my Lords, that everyone has been mistaken for these 200 years, and that this new light has just now arisen to us? Surely it is a much less evil to make a construction, even contrary to the common rules of law (though I think this is not so) than to overthrow I may say 100,000 settlements; for it is a maxim in law, as well as reason, *communis error facit jus*," 3 Atk. at p. 139; it is clear from what was said by Willes, C.J., ibid at p. 139, that the judges rightly thought that if the remainder to the trustees was contingent, and they died before the contingency happened, their heirs could not take; as to this see above 102.

[2] Third Report of the Real Property Commissioners (1832) 25.

[3] 3, 4 William IV. c. 27; above 23.

[4] 3, 4 William IV. c. 74.

[5] 8, 9 Victoria c. 106 § 4.

[6] 7, 8 Victoria c. 76 § 8; for an account of some contemporary criticisms of this Act see Thorndyke, Contingent Remainders, H.L.R. xxx, 227-228.

[7] 8, 9 Victoria c. 106 § 8.

trustees to preserve contingent remainders for the purpose of preventing the destruction of contingent remainders by these means; and, from this point of view, we may regard this clause of the Act of 1845 as one more example of the manner in which the Legislature has, in the nineteenth century, simplified conveyances by giving statutory force to those devices of the conveyancers of which the practical usefulness had been proved by time.

(ii) The rule that a contingent remainder will fail, if it is not ready to vest either before or at the same instant as the precedent estate determines, is still, in a modified form, part of the law. This rule was maintained, because it was seen to be necessary in order to prevent settlors from limiting contingent remainders, in such a way that they vested at too remote a date, and so caused the land to be inalienable for an unduly long period. Until the second half of the nineteenth century the only relaxation in this rule was a statute of 1698,[1] which was passed to remove the doubts which were entertained of the correctness of the decision in *Reeve v. Long*.[2] That statute, in effect, enacts that posthumous children should be able to take a contingent remainder limited to them by any marriage or other settlement,[3] as if they had been born in their father's lifetime. In 1876, in the case of *Cunliffe v. Brancker*, James, L.J., said,[4] "the rule of law was, and strange to say still is, that a contingent remainder fails unless there be a preceding freehold estate continuing to exist up to the happening of the contingency on which the remainder is to vest. Contingent remainders have been protected against the destruction of the preceding particular estate, but have been still left to die with the death of such estate through an inherent defect in their original constitution." In consequence of the strictures passed in that case upon the inflexibility of this rule,[5] the law was modified by the Contingent Remainders Act 1877, which provides that, if a contingent remainder would have been valid as a shifting use or executory devise, if it had not had a sufficient estate to support it as a contingent remainder, it shall not fail because it is not ready to vest at the determination of the precedent estate.[6]

[1] 10 William III. c. 22.

[2] Above 107; Challis, Real Property (3rd ed.) 140.

[3] There seems little doubt that the statute applies to devises, Roe v. Quartley (1787) 1 T.R. at p. 634; Butler, in his notes on Co. Litt. 298, says that there was a tradition that the Lords were unwilling that there should be an express mention of devises lest it should cast doubts on their decision in Reeve v. Long; but see above 107 n. 1.

[4] 3 C.D. at p. 407; cp. White v. Summers [1908] 2 Ch. 256.

[5] Challis, Real Property 141.

[6] 40, 41 Victoria c. 33; for a restrictive view as to the extent of the relief given by the Act see Strahan, Conveyancing (2nd ed.) 180; the Real Property Commissioners in 1832, as part of their scheme for a uniform rule against perpetuities, proposed a similar measure, Third Report 25.

The Act, therefore, does not save all contingent remainders from destruction by reason of their failure to vest at the time when the precedent estate determines, but only such as would have been good if originally created as shifting uses or executory devises. The reason why the Legislature has given to contingent remainders only this modified measure of protection is, as we shall see,[1] due to the same reason as the original rule which caused them to fail if they were not ready to vest when the precedent estate determined, namely the fact that a larger measure of protection would have rendered it possible to restrict alienation unduly by their means.[2] But we cannot understand the full meaning of the Act, and the reason why it was safe to give this modified protection to contingent remainders, till we have considered the history of these executory interests, and the rules devised by the courts to guard against the creation of a perpetuity by their means. With these topics I shall deal in the three following sections.

§ 4. Executory Interests

The number and variety of the future estates in the land recognized by modern English law are large. This fact can only be accounted for by the length and accidents of the history of this branch of the law; and it is only history which can explain the complicated rules which regulate the nature of these estates, and their relations to one another. These future estates in the land can, from the point of view of their historical origin, be divided into three great classes. Firstly, there are the future estates recognized by the original common law—the reversions, and the vested and contingent remainders, the history of which has been already related.[3] Secondly, there are the future estates which were, so to speak, brought into the common law, and made legal estates, by the operation of the statutes of Uses[4] and Wills.[5] They are the shifting and springing uses, and the executory devises of our modern law. Thirdly, there are the purely equitable estates, which are mainly due to developments in the principles of equity which took place after the passing of the statutes of Uses and Wills. It is the history of these two last classes of future estates in the land that is the subject of this section.

At the beginning of the sixteenth century only two varieties of future estates in the land were recognized. Firstly, there were the common law reversions and remainders, which, as we have

[1] Below 204-205.
[2] Above 96.
[3] Vol. iii 134-136; above § 3.
[4] 27 Henry VIII. c. 10.
[5] 32 Henry VIII. c. 1; 34, 35 Henry VIII. c. 5.

seen, were subject to very strict rules.[1] We have seen, too, that the validity of contingent remainders, which were not wholly in conformity with some of these rules, was only beginning to be grudgingly admitted.[2] Secondly, there were the future estates created by means of uses, either by act *inter vivos* or by will.[3] We have seen that though, in some respects, equity followed the law in regulating the incidents of these estates, it also made very wide departures from the law; and that, in fact, it allowed landowners to create them very much as they pleased.[4] Landowners were, it is true, subject to the rules of statute law, passed to prevent the accomplishment, by means of uses, of fraudulent or otherwise illegal purposes;[5] but, subject to these rules, they were left very free to deal with their property as they pleased. Perhaps the best illustration of the very wide freedom which they enjoyed is furnished by *Manning and Andrew's Case*.[6] It appears from that case that, in 1517, a settlor created, apparently without objection, a set of limitations which later lawyers would have condemned on the ground that it in effect amounted to a perpetual freehold, and so was equivalent to a "perpetuity" or unbarrable entail.[7] In other words, settlors were left so free to create what estates they liked by means of uses, that they could even create a perpetuity by this means.

All this was changed by the statutes of Uses and Wills. The statute of Uses, as we have seen, converted the most important variety of uses into legal estates;[8] and the statute of Wills, by reason of the wide power of devise which it gave, created a new form of future estate in freeholds—the executory devise.[9] Testators soon began to create these executory devises both in freeholds and in terms of years; and, in order to give effect to their dispositions, whether in freeholds or in terms of years, they often employed the machinery of the use. But, though the statute of Uses turned the most important variety of uses into legal estates, we have seen that it did not turn all uses into legal estates. Uses of chattels were not affected, nor were uses of terms of years, or of copyholds; and the statute did not operate where the feoffees to uses had active duties to perform.[10] Thus certain varieties of equitable interests were still left.

It is obvious that the interpretation of the wide provisions of

[1] Vol. iii 134-136; above 84-86.
[2] Above 87-92.
[3] Vol. iv 421-427.
[4] Ibid 437-442.
[5] Ibid 443-446.
[6] (1576) 1 Leo. 256.
[7] Vol. iv 441 and n. 4; we shall see, below 194 n. 2, 197, that, in the sixteenth century and later, the term perpetuity meant a set of limitations which were equivalent to an unbarrable entail; and that it only gradually acquired, as the modern rule against perpetuities grew up, a different meaning.
[8] Vol. iv 463.
[9] Ibid 466-467.
[10] Vol. iv 463; below 134.

these statutes, and especially the provisions of the statute of Uses, raised many serious problems for the courts; and we shall see that the difficulty of these problems was increased, in the latter half of the sixteenth century, by the frequency with which landowners took advantage of the uncertainty of the law, and attempted to create unbarrable entails or perpetuities.[1] Bacon, in the introductory discourse to his Reading on the statute of Uses, which was delivered in 1600, thus describes the effect of the statute upon the law of his own day:[2]—"I have chosen," he said, "to read upon the statute of Uses, made 27 H. VIII. ch. 10, a law whereupon the inheritances of this realm are tossed at this day, as upon a sea, in such sort that it is hard to say which bark will sink, and which will get to the haven: that is to say, what assurances will stand good, and what will not. Neither is this any lack or default in the pilots, the grave and learned judges; but the tides and currents of received errors and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to law. . . . In 37 Reginae by the notable judgment given upon solemn arguments of all the judges assembled in the Exchequer Chamber, in the famous case between Dillon and Freine, concerning an assurance made by Chudleigh, this law began to be reduced to a true and sound exposition; and the false and perverted exposition which had continued for so many years . . . grew to be controlled. Since which time, as it cometh to pass always upon the first reforming of inveterate errors, many doubts and perplexed questions have arisen, which are not yet resolved, nor the law thereupon settled."

It was the united, and in some respects competitive action of the courts of common law and equity, which ultimately settled these "doubts and perplexed questions," and so created our modern law of executory interests. We shall see that the rivalry between the courts of common law and equity, which was latent during the greater part of the sixteenth century, and became acute at its close,[3] helped to prevent the provisions of these statutes from being too restrictively construed.[4] The result was the development, firstly, of a large number of future legal estates in land; and, secondly, of elaborate doctrines as to equitable estates. Firstly, the common law recognized the following varieties of future estates: contingent remainders, and also contingent uses and executory devises, which, because they could be construed as contingent remainders, must, it was held, be so construed;[5] shifting and springing uses and executory devises of freeholds, which differ in

[1] Below 194.
[2] Works (Ed. Spedding) vii 395-396.
[3] Vol. i 460-463; vol. v 219-224, 236-238, 251-252.
[4] Below 130-134.
[5] Below 126-128.

many important respects from contingent remainders and interests taking effect as contingent remainders; and executory devises of terms, which differ both from contingent remainders and other future interests in freeholds. Secondly, equity still regulated the future interests which were created by means of those uses to which the statute of Uses did not apply. When, at the latter part of the seventeenth century, it began to enforce the use upon a use as a trust,[1] it to a large extent duplicated the existing legal interests; and it did a great deal more than duplicate them. It manipulated the incidents of these new trust estates in such a way that they became interests of a very different character from the mediæval uses before the statute of Uses; and, as the result of this manipulation, it adapted them to meet the needs of settlors and testators, who wished to settle their property with the object of providing for the various needs of their families.[2]

It is clear, therefore, that the modern varieties of executory interests originate in the provisions of the statutes of Uses and Wills; in the manner in which these statutes were interpreted by the courts of common law and equity; and in the later developments made by those courts from the basis of the principles established by this interpretation. I have already given some account of the history of the enactment of these statutes, and summarized their provisions.[3] Here we must consider, firstly, the interpretation of these statutes and the resulting development of executory interests both legal and equitable; and, secondly, the nature and incidents of these executory interests.

The Interpretation of the Statutes of Uses and Wills, and the Resulting Development of Executory Interests, Legal and Equitable

We have seen that, as the result both of the statute of Uses and the statute of Wills, it became possible to create a number of executory interests, wholly unknown to the common law, which conferred legal estates in the land upon those entitled to them. I have already explained the manner in which this result was produced by the operation of the statute of Uses. We have seen that, as soon as the seisin of land or other hereditaments was transferred to feoffees to the use of another, or as soon as by implication or by operation of law a use was created on the seisin of the legal owner, that use was turned into a legal estate; and that therefore all the methods, formerly applicable to the creation of uses, now became applicable to the creation of legal

[1] Vol. iv 468-473; vol. v 307-309; vol. vi 641-642.
[2] Below 144-149. [3] Vol. iv 449-473.

estates.[1] Similar results were produced by the operation of the statutes of Wills.[2] But it should be noted that these statutes could be called into operation in one of two ways. A testator might directly devise his land, and the executory devises created by him took effect by virtue of the provisions of the statutes of Wills, which authorized such devises. Or a testator might, by the form of his devise, show that he intended to make use of the machinery of the statute of Uses to effect his purposes. In that case, by reason of the intention expressed by the testator, the estates created by the will took effect as legal estates by virtue of the statute of Uses.[3]

This result was not arrived at without some controversy; for it is obvious that the relation between the effects of the statute of Uses, and the later statutes of Wills, is not immediately obvious. It would seem that the question arose first with reference to the clauses of the statute of Uses relating to jointure. We have seen that the statute had enacted that a jointure, settled by the husband on the wife, should, under certain conditions, bar her right to dower.[4] In several cases of the middle of the sixteenth century it had been held that a devise to a woman by her husband was not a valid jointure.[5] One reason for these decisions was that, as the statutes of Wills were passed after the statute of Uses, and as land was not devisable after the statute of Uses and before the statutes of Wills, a devise could not be intended to be one of those conveyances which could come within the clauses of the statute of Uses relating to jointure.[6] But in 1572, in *Vernon's Case*, this reasoning was declared to be fallacious. It was said that a devise might, if it were so expressed, operate as a jointure which would bar her dower, for, "it is frequent in our books that an Act made of late time shall be taken within the equity of an Act made long time before."[7] This case, therefore, made it clear that some at least of the clauses of the statute of Uses might be applied to wills, if a testator so intended. In 1576, in *Andrew's*

[1] "Note, uses are raised either by transmutation of the estate as by fine, feoffment, common recovery etc., or out of the state of the owner of the land, by bargain and sale, by deed indented and enrolled, or by covenant upon lawful consideration," Co. Litt. 271b; see vol. iv. 421-427.

[2] Ibid 465-467.

[3] "When a man gave real estate to the use of A upon trust for B, it was held that A took the legal estate, the language of conveyancers in settlements to which the statute of Uses applies being so used in the will as to amount to an expression of intention that the same mode of construction should be adopted. Beyond that the statute of Wills had no direct bearing," Baker v. White (1875) L.R. 20 Eq. at p. 171 *per* Jessel, M.R.; see also *In re* Tanqueray-Willaume and Landau (1882) 20 C.D. at p. 478; *In re* Brooke [1894] 1 Ch. at pp. 48-49.

[4] Vol. iii 196; vol. iv 462.

[5] Brooke, Ab. *Dower*, pl. 69 (1553); Dame Dennis' Case (1566) Dyer 248a.

[6] Vernon's Case (1872) 4 Co. Rep. at f. 4a. [7] Ibid.

Case,[1] it was laid down that a devise of land could be to a use expressed by indenture or other writing, but not to a use expressed by parol.[2] This statement clearly assumed that a testator might, if he so desired, make use of the machinery of the statute of Uses to give effect to his dispositions; and this principle was stated in so many words in 1600 in *Sir Edward Clere's Case*.[3] It was there held that, if a man makes a feoffment to the use of his last will, he has the use in the meantime; and that he might either limit the uses according to the power reserved to himself, in which case the will was merely declaratory of the uses; or he could, as owner of the land, directly devise it by his will.[4] "For the testator had an estate devisable in him, and power also to limit a use, and he had election to pursue which of them he would."[5] That a testator could, if he chose, make use of the machinery of the statute of Uses was admitted in 1682,[6] in 1691,[7] and in 1704.[8] As Lord St. Leonards has said, "in later times the same point has been repeatedly ruled or treated as clear, and there is not a single case in which the point has been doubted."[9]

We must now consider the history of the manner in which the courts of law and equity dealt with these future estates in the land, legal and equitable. In the first place, I shall consider the treatment of these new legal estates by the common law; and, in the second place, I shall indicate briefly the sphere which came to be occupied by the new equitable interests which emerged at a later date.

(1) The treatment of these new legal estates by the common law.

The history of the treatment of these new legal estates by the common law falls into two fairly well marked chronological periods:—Firstly the sixteenth century; and secondly the late sixteenth and early seventeenth centuries. We shall see that, in the latter period, the somewhat drastic attitude taken up by the common law was modified by the influence of equity. In both

[1] Moore, at p. 107.

[2] Because the statutes of Wills required the will to be in writing, below 367-368.

[3] 6 Co. Rep. 17b; see also Co. Litt. 111b, 112a, 271b.

[4] "When a man makes a feoffment to the use of his last will, he has the use in the meantime. If, in such case, the feoffor by his will limits estates according to his power reserved to him on the feoffment, then the estate shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but if in such case the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, then it shall pass by the will," 6 Co. Rep. at f. 18a.

[5] Ibid.

[6] Popham v. Bampfeild, 1 Vern. at p. 80.

[7] Burchett v. Durdant 2 Ventr. 311.

[8] Broughton v. Langley 2 Ld. Raym. 876.

[9] Sugden, Powers (8th ed.) 148, and the cases there cited.

periods we must deal separately with executory interests in freeholds, and executory interests in terms of years.

The sixteenth century.

A. *Freeholds.*

In the development of the law as to executory interests in freeholds we can distinguish two tendencies or lines of thought with regard to these interests, which can be termed respectively the liberal and the restrictive.

It seems to have been recognized, shortly after the passing of the statute of Uses, that uses could be created to arise on a future event, and that, when the event happened and the uses arose, they would be executed by the statute.[1] Thus in 1538 it was held that, if A covenanted with B that, when B enfeoffed A with three acres of land, A would stand seised of his lands in S. to the use of B, the use in favour of B would arise when B enfeoffed A of the three acres.[2] Similarly it was recognized that uses, whether created before or after the statute, could be limited to shift over to another person on the happening of an event. Thus in 1552 it was held that, if a man made a feoffment to W and his heirs till A paid £40 to W, and then to the use of A and his heirs, these uses would arise just as they arose before the statute, and that the statute would execute these uses when they arose.[3] The view of the law embodied in these, and many other cases of this century, was well summed up by Manwood, C.B., in *Brent's Case*:[4] "Uses," he said, "are not directed by the rules of the common law, but by the will of the owner of the lands: for the use is in his hands as clay is in the hands of the potter, which he in whose hands it is may put into what form he pleaseth: and notwithstanding that now the possession be executed to the use, yet the property and quality, as abstracted from the possession, shall not be drowned in the possession: and so forasmuch as uses were by permission of law guided at the wills of the parties, so also shall be the possessions: and so, because, that an use, as abstracted from the possession, might have been well limited to the wife that should be, notwithstanding that at the time of such limitation such a one was not in esse, in the same manner it shall be now, when the possession is presently executed to the use." Upon this view of the working of the statute the comment of

[1] For the classification of uses into contingent, springing, and shifting, see below 136.

[2] Brooke, Ab. *Feffements al Uses* pl. 50.

[3] Ibid pl. 30—"Et ideo vide que home al cest jour poet faire feffement al use, et que l'use changera de un in auter per acte ex post facto per circumstance, si bien que il serra devant lestatut 27 H. 8 de Uses"; The question was raised in this case whether A's estate could vest without an entry on the part of the feoffees—a matter frequently discussed in later cases, Gray, Perpetuities (2nd ed.) 111 n. 3; as to this point, and its connection with the "scintilla juris" controversy, see below 138-140.

[4] (1583) 2 Leo. at p. 16.

Bacon[1] is very apposite. "The title," he said, "in the course of pleading is, *Statutum de usibus in possessionem transferendis.* Wherein, Walmsly, Justice, noted well, 40 Reginae, that if a man look to the working of the statute, he would think it should be turned the other way, de possessionibus ad usus transferendis, for that is the course that the statute holdeth, to bring possession to the use."

Similarly, whatever may have been the law as to devises under the customs of cities,[2] no question seems to have been raised as to the validity of executory devises after the statutes of Wills. In two cases of executory devises, reported by Dyer in 1555,[3] the capacity of the testator to create such future interests in land by his will seems to be assumed; and, by the end of the sixteenth century, it was well settled that an estate devised to one in fee could be made to shift to another on the non-performance of a condition.[4]

But, from the first, there were lawyers who took the view that uses executed by the statute, and executory devises, should, so far as possible, be confined within the strict common law rules regulating the limitations of estates. Probably not many were of the opinion of the Reader of Gray's Inn who, as Bacon tells us, deservedly got into trouble, because he maintained the thesis that the statute of Uses intended to put an end to the future creation of uses.[5] But a good many seem to have considered that, the more tightly uses were restricted by the old common law rules, the more likely was it that the intention of the framers of the statute, as expressed in the preamble to the statute, would be carried out; and, as Bacon said, in his own day, some, "in an immoderate invective against uses," seemed inclined to relapse into the heresy of the Reader of Gray's Inn.[6] Possibly Bacon, when he wrote these words, was thinking of his great rival Coke, and of some of the dicta in *Chudleigh's Case.* Coke, in his argument in that case, went near to maintaining this thesis. After amplifying the statements in the preamble to the statute as to the ill effects of uses, he argued that it was absurd to suppose that "the makers of the Act intended not only to continue but to increase and preserve such wickedness, mischiefs, and inconveniences."[7] The intention, he argued, was rather to revive the ancient common

[1] Reading, Works vii 417.

[2] In 1538 Fitzherbert and Baldwin held that a testator devising land under the custom of London could not limit a fee on a fee, Dyer 33a.

[3] Anon. Dyer 124a; Wilford v. Wilford ibid 128a; and see Gray, Perpetuities (2nd ed.) 112-113.

[4] Wellock v. Hammond (1590) Cro. Eliza. at p. 205; cp. Boraston's Case (1587) 3 Co. Rep. at ff. 20b, 21a.

[5] Reading on the statute of Uses, Works vii 423, cited vol. iv 463 n. 1.

[6] Ibid.

[7] 1 Co. Rep. at f. 125a.

law, and though not absolutely to abolish, at any rate to discourage future conveyances to uses.[1] It followed, therefore, that the courts should, so far as possible, construe such uses as were allowed to exist in accordance with the principles of the common law.[2] In his judgment in *Chudleigh's Case*, Popham, C.J., acceded to this argument, and laid it down that "uses invented and limited in a new manner not agreeable to the ancient common laws of the land . . . are utterly extirpated and extinguished by this Act: for it appears by the express letter of the Act, that it was the intent of Parliament to extirpate and extinguish them, and to restore the ancient common law of the land."[3] "Further," he said, "there was no difference at this day between estates conveyed in use, and estates conveyed in possession, for the estate and limitation of an use ought to be known to the common law, and governed and directed by the rules thereof."[4] We can see the same idea in Coke's unsuccessful argument in *Woodliff v. Drury*,[5] to the effect that, after a limitation of the fee, a springing use could not arise upon the marriage of the person to whom the fee was limited. Later still he insisted, in his report of *Mildmay's Case*, that, as the common law "has certain rules to direct the estates and inheritances of lands," it is therefore "without any comparison better to have estates and inheritances directed by the certain rules of the common law (which has been an old true and faithful servant to this commonwealth) than by the incertain imagination and conjecture of any of these new inventors of uses, without any approved ground of law or reason."[6] As late as 1694 it was argued (of course unsuccessfully) that a new springing use could not be limited to begin in futuro, because such an estate was not good at common law, and, after the statute of Uses, "uses must be subject to the common law."[7]

The reason for the prevalence of this more restrictive view of

[1] "It appears also by divers branches of the Act, that the makers of the Act did not expect, that any land after the statute should pass by limitation of uses, unless only uses upon bargain and sale which they thought convenient to continue. And therefore they did at the same Parliament add to this, inrolment of record, which is agreeable to the preamble, *scil.* matter of record, but other uses they did not expect would, after the Act, have been put in use, but that the land should pass by solemn livery, record etc., as is contained in the preamble," ibid.

[2] "And it was said that no uses shall be executed by the statute of 27 Hen. 8 which are limited against the rules of the common law; and the reason thereof is manifest; for it appears by the preamble of the statute 27 Hen. 8 that it was the intent of the makers of the Act, to restore the ancient common law of the land, and to extirpate and extinguish such subtle practised feoffments, fines, recoveries, abuses, and errors, tending to the subversion of the good and ancient common law of the land," ibid at f. 129b.

[3] Ibid at f. 138a. [4] Ibid at f. 138b. [5] (1595) Cro. Eliz. 439.

[6] (1606) 6 Co. Rep. at f. 43a; and see also FitzWilliam's Case (1605) 6 Co. Rep. at f. 34a.

[7] Davies v. Speed 12 Mod. at p. 39 *per* Northey *arg.*; cp. Southcot v. Stowel (1674) 2 Mod. at p. 210 *per* Stroud *arg.*

the effect of the statute of Uses, at the end of the sixteenth century, was the dread of allowing any set of limitations which tended to a perpetuity. This dread was, as we shall see, occasioned by the constant efforts of the landowners at this period to create these perpetuities;[1] and naturally many lawyers considered that the danger could best be combated by subjecting these uses to common law rules. But, at the end of the sixteenth century, it was too late to deny the validity of these shifting and springing uses and executory devises. Their validity had been admitted in too many cases; and the judges considered, and on the whole rightly considered, that the rules, which they were laying down for the limitations of these estates, were quite sufficient safeguard against the creation of these perpetuities.[2] These rules were in fact a compromise between the more liberal and the more restrictive constructions, which it was proposed to put upon the powers of settlors and testators to limit future estates by means of shifting and springing uses and executory devises. They can be grouped under the following two heads: Firstly, there are rules which, in effect, subject certain of these estates to common law rules of limitation; and, secondly, there is the principle that these future interests were destructible by those having present vested interests in the land.

(i) The rules which, in effect, subjected certain of these estates to common law rules of limitation, fall into two groups.

(*a*) Certain of the rules which determined whether a cestui que use, who had settled his estates, was seised of the old use, or whether he took by virtue of the new uses limited by the settlement, were obviously formed on the analogy of the common law rules of limitation, and operated indirectly to prevent the creation of a perpetuity. Thus, in the *Earl of Bedford's Case*, it was held that under a limitation to the use of the grantor for forty years, and then to the use of his son in tail, remainder to the use of the right heirs of the grantor, the grantor took by virtue of the old use, as a quasi-reversion, so that he could dispose of it as he pleased.[3] If it had been held that the right heirs took the remainder as purchasers, the grantor could not thus have disposed of it.[4] This difference between taking by virtue of the old use as

[1] Below 194.

[2] Thus in Woodliff v. Drury (1596) Cro. Eliza. 439, the judges refused to assent to Coke's argument, and held that "although he be seised of the fee in the meantime, as in truth he is, yet by the marriage the new use shall arise and vest, if there be no act in the mean time to destroy that future use (as it was in *Chudley's Case*), according to the limitations of the use."

[3] (1593) Moore 718; Sanders, Uses (5th ed.) i 138-139; "So if I enfeoff A to the use of his right heirs, A is in of the fee simple, not by the statute, but by common law," Bacon, Reading, Works vii. 439.

[4] Sanders, Uses i 139; and in the sixteenth century it was otherwise a matter of some practical importance; Bacon says, Reading 441, "Now let me advise you of

a quasi-reversion, and taking by virtue of the new use as a quasi-remainder, is clearly an analogy to the common law reversions and remainders; and it is clear from Bacon that it was well settled at the end of the sixteenth century.[1] Similarly, if land held by A to his own use were limited by A to the use of B, and it was provided that, on breach of some condition, it should revert to the use of A, A, on the happening of this condition, took by virtue of his old use; and, thus taking, was not bound by any conditions which might be attached to the new use. Thus, in the case of *Holloway v. Pollard*,[2] Holloway, the grandfather of the plaintiff, bargained and sold an estate to Pollard, the father of the defendant, in fee, on condition that, if Holloway paid £500, he should re-enter, and be seised in fee till he attempted to alien without the assent of Pollard or his heirs. Holloway paid the £500, re-entered, and afterwards the plaintiff aliened without licence. It was held that no use could arise in favour of the defendant, because the bargainor, Holloway, entering by force of a condition, was in of his old use and estate, and could not therefore be seised to the new use which restricted alienation.

(*b*) It was during this period that we can see the beginnings of the rule that, if any future limitation can be construed as a contingent remainder, it must be so construed. It is probable that this rule must ultimately be traced back to the dicta in *Chudleigh's Case*, and other cases, to the effect that uses, not limited in ac-

this, that it is not a matter of subtlety or conceit to take the law right when a man cometh in by law in course of possession, and when he cometh in by the statute in course of use; but it is material for the deciding of many cases and questions; as for warranties, actions, conditions, waivers, suspensions, and divers other purposes."

[1] "Note also, the very letter of the statute doth take notice of a difference between an use in remainder and an use in reverter; which though it cannot be properly (because it doth not depend upon particular estates as remainders do, neither did then before the statute draw any tenures as reversions do), yet the statute intends there is a difference, when the particular use and the use limited upon the particular use are both new uses, in which case it is an use in remainder; and when the particular use is a new use, and the remnant of the use is the old use, in which case it is an use in reverter," Reading, Works vii 427; thus, "If I enfeoff J. S. to the use of J. D. for life, and then to the use of himself and his heirs, he is in of the fee simple merely in course of possession and common law, and as by a reversion, and not by a remainder," ibid 440.

[2] (1606) Moore 761; as Challis put it in his "Song of Uses Old and New" (L.Q.R. vi 330):—

> "Sage Gaius, a mind that defies competition,
> Ne'er dreamt of that maxim so sooth fast and true:
> If land to the feoffor reverts by condition,
> He's in of the old use, and not of the new."

It seems to me that Mr. Sweet, in his criticism of Challis's Song of Uses (L.Q.R. xxxv 131-132), has not quite sufficiently allowed for the manner in which the analogy of some of these common law rules was followed in settling the rules applicable to uses new and old; that these analogies were very present to the mind of the judges is clear from Bacon and many other cases; and, that being so, the lines in the song hardly seem to overstep the permitted bounds of poetic licence.

cordance with the rules of the common law, are invalid; and the breadth of these dicta accounts for the undue extension which has been sometimes given to it.[1] The manner in which the rule was evolved is probably somewhat as follows: though these dicta were not literally followed, and though it was admitted that future interests unknown to the common law could be validly created, it followed from the decision in *Chudleigh's Case* that, if future interests were created by use or otherwise which were obviously meant to take effect as remainders, the rules as to remainders must be applied to them. But, since the decision in that case was avowedly based on the rule of public policy that perpetuities must at all costs be frustrated, it was expedient that as large an extension as possible should be given to it. A large extension was given to it by the decision to treat this rule as a rule, not of construction, but of law; and, irrespective of the intention of the parties, to treat as remainders all limitations which might thus take effect.[2] We can see clear traces of the application of this rule to an executory devise in 1587;[3] and its application to contingent uses was obviously in harmony with the ratio decidendi in *Chudleigh's Case* which came before the courts two years later.[4] Bacon, it is true, did not draw this conclusion from the decision;[5] but Hale's statement of the rule in the case of *Purefoy v. Rogers*[6] —a case of an executory devise—has always been accepted as final.[7] At the present day the importance of this rule has been

[1] Adams v. Savage (1702) 2 Salk. 679; Rawley v. Holland (1712) 22 Vin. Ab. 189 pl. 11; for criticisms of these cases see Sanders, Uses (5th ed.) i 147-148; Sugden, Powers (8th ed.) 36-37.

[2] See White v. Summers [1908] 2 Ch. at p. 263, where this view seems to be adopted by Parker, J.; but note that the liability of contingent remainders to fail depended, not as is there stated, upon principles of feudal tenure, but upon the common law doctrines as to seisin, above 105, 107-109.

[3] Challener and Bowyer's Case 2 Leo. 70; in that case W.B. devised his land to his younger son in tail, remainder to the heirs of the body of the elder son, remainder to his two daughters in fee; the younger son died without issue, in the life of the elder son who had issue; the issue entered, and novel disseisin was brought against him; the plaintiff recovered because the defendant was not entitled to take as heir to his father in the lifetime of his father; the argument that in a devise this rule ought not to hold against the intent of the testator was rejected by the court—"Whereupon the tenant produced witnesses who affirmed upon their oaths that his devisor declared his meaning concerning the said will, that as long as his eldest son had issue of his body, that the daughters should not have the land: but the Court utterly rejected the matter; and judgment was given for the plaintiff."

[4] (1589-1595) 1 Co. Rep. 120a; White v. Summers [1908] 2 Ch. at p. 263.

[5] Reading, Works vii 439-440.

[6] (1671) 2 Wms. Saunders at p. 388.

[7] "When a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise"; see also Reeve v. Long (1695) 4 Mod. 282; Loddington v. Kime (1695) 1 Salk. 224; Fearne, Contingent Remainders (9th ed.) 386, 394-395. It may happen that "a change of circumstances' after the death of the testator, may convert into a remainder what, at the death of the testator, and without such change, could only have operated by way of executory devise," Doe d. Harris v. Howell (1829) 10 B. and C. at p. 202; and the converse is also true, see Fearne, op. cit. 525-526.

much diminished by the Contingent Remainders Act, 1877, which, as we have seen, has in certain cases substituted the precisely contrary rule.[1] But, except in cases to which that Act applies, it is still part of English law.

(ii) Throughout the sixteenth century these executory interests were as freely destructible, by those having vested interests in the land, as contingent remainders. This rule was laid down quite clearly in *Brent's Case*.[2] We have seen that in that case Manwood, C.B., had insisted on the differences between uses and common law estates, and had explained that these differences still existed after the passing of the statute of Uses.[3] But it was held in that case that a contingent use to an unascertained person was destroyed by a feoffment, in which the tenant for life, the feoffees, and the vested remainderman in fee joined. The estate, he said,[4] in favour of the unascertained person would "grow out of the estate of the feoffees in seasonable time"; but, "if the estate of the feoffees, which is the root of the uses, be destroyed by the alienation of the land before the uses have their being, as in our case it is, no use can afterwards rise, for by the feoffment they are destroyed, and also every possibility of them." This decision was confirmed by *Chudleigh's Case*, in which it was held that the contingent uses were destructible by the joint action of the feoffees to uses and the cestui que use.[5] On the other hand, it is clear that if the feoffees had not joined, and the tenant for life had, e.g. by a tortious feoffment, devested the contingent uses, the feoffees had a right of entry. Just as a right of entry would support a contingent remainder,[6] so it allowed the feoffees to enter and revive the uses as and when they arose. "It was held that the feoffees since the statute had a possibility to serve the future use when it came in *esse;* and that in the meantime all the uses in *esse* shall be vested; and when the future use comes in *esse*, then the feoffees (if the possession be not disturbed by disseisin or other means) shall have sufficient estate and seisin to serve the future use when it comes in *esse* to be executed by the force of the statute. . . . By this construction the interest and power that everyone hath, will be preserved by the Act; for if the possession be disturbed by disseisin or otherwise, the feoffees will have power to enter to revive the future uses according to the trust reposed in them."[7] Similarly, it would seem from the case of *Purslowe*

[1] Above 115.
[2] (1583) 2 Leo. 14.
[3] Above 122.
[4] 2 Leo. at p. 18.
[5] 1 Co. Rep. 120a; see Sanders, Uses (5th ed.) i 241-242.
[6] Above 108.
[7] 1 Co. Rep. 137a; cp. Woodliff v. Drury (1596) Cro. Eliza. 439 cited above 125 n. 2; Wegg v. Villers 2 Rolle Ab. 796. See below 138-140 for the scintilla juris controversy, in which this passage is important, as indicating an assent to the theory of the need for a scintilla juris.

v. Parker,[1] that an executory devise over, in favour of unascertained persons, was destructible by a feoffment.

We shall see that, towards the end of the sixteenth century, there are some signs that the common law courts were beginning to think of revising their doctrines as to the destructibility of these future interests in freeholds.[2] But as yet this process is only beginning. As yet they are as destructible as contingent remainders.

B. Terms of Years.

Future interests in terms of years cannot be created by deed by way of remainder;[3] and if a person were possessed of a term, and settled it to uses, the uses were not executed by the statute.[4] Therefore the common law courts were not called upon to adjudicate upon the validity of such uses. But terms could be devised; and settlors tried by executory devise to settle their terms. The treatment by the common law of these executory devises of terms was even more drastic than its treatment of executory devises of freehold interests in land. Because a term was only a chattel, the judges thought that it was impossible to limit estates in it similar to estates recognized in freehold interests in land. Thus in 1536 a devise of a term of forty years to an eldest daughter in tail, with remainder, if she died without issue during the term, to the second daughter in tail, was held to be void. "It is contrary to law," said Baldwin and Shelley, J.J., "that a term may be limited in remainder any more than other chattels personal, as a cup or other chattel."[5] In 1553 all the judges considered that it was impossible to devise a term for life and then over. If such a devise were made the devisee for life took the whole; and, if he disposed of it, the devisee in remainder was without remedy.[6] As late as the beginning of the seventeenth century distinguished judges,[7] including Coke[8] took this view; but, as we shall see directly, by that time the current of opinion was beginning to set in a contrary direction.[9]

It is clear that, so long as these views as to the nature of these executory interests prevailed, there was little danger that a

[1] 2 Rolle Ab. 253 pl. 2; ibid 793 pl. 2; S.C. 2 Rolle Rep. at pp. 218-219; see generally on this topic of the destructibility of these executory interests Gray, Perpetuities (2nd ed.) 116-119.

[2] Below 132-133.

[3] Cecil's Case (1566) Dyer 253b; cp. Gray, Perpetuities (2nd ed.) 120.

[4] Vol. iv 463.

[5] Anon. Dyer 7a.

[6] Ibid 74b; North v. Butts (1557) Dyer at f. 140b.

[7] Anon. (1587) 3 Leo. 195 *per* Anderson, C.J., and Rhodes, J.; Woodcock v Woodcock (1600) Cro. Eliza. 795 *per* Anderson, C.J., Walmesley and Kingsmil, J.J., cited Gray, op. cit. 121.

[8] Mallet v. Sackford (1607) Cro. Jac. 198.

[9] Below 130-132.

perpetuity could be created by their means. The application to them of certain of the principles regulating the limitations of common law estates, and more especially the application to them of the rules relating to the creation and destruction of contingent remainders, were sufficient. And so we shall see that it is round these principles and rules that the older rules against perpetuities centre.[1] We shall now see that other views as to the nature of these executory interests were beginning to prevail at the end of the sixteenth and the beginning of the seventeenth centuries. It is then that they acquired their modern quality of indestructibility, which differentiates them more completely than they had before been differentiated from contingent remainders. We shall see that it is for this reason that it was found necessary to create a modern rule against perpetuities side by side with the older rules.

The late sixteenth and early seventeenth centuries.

It was probably the competition of the court of Chancery which introduced, during this period, certain modifications of the common law doctrines which have just been discussed. These modifications began with the common law doctrines as to executory devises of terms, and later extended to executory interests in estates of freehold. Therefore I shall adopt the chronological order, and deal first with executory devises of terms, and then with executory interests in freeholds.

A. Executory devises of terms.

There were two main reasons why the common law doctrines as to executory devises of terms of years should be modified before the common law doctrines as to executory interests in estates of freehold. In the first place, future interests in terms created by way of use, not being executed by the statute of Uses, were under the control of the court of Chancery. In the second place, we have seen that landowners employed very extensively the device of creating a long term of years in order to evade the incidents of feudal tenure.[2] Terms of years were therefore very common and very important interests; the court of Chancery still retained jurisdiction over uses of terms; and the treatment by the courts of common law of executory devises of terms was far too drastic, and depended at bottom upon the very technical idea that a term was merely a chattel. There can be little doubt that the court of Chancery would have interfered to protect those entitled to these executory interests if, in the second half of the sixteenth century, the common law judges had not begun to modify their views.

[1] Below 202-214. [2] Vol. iv 465 n. 2, 472; vol. v 307; vol. vi 641.

This process of modification began in 1568.[1] In 1578, in the case of *Welcden v. Elkington*,[2] it was held that an executory devise over, after the death of the first taker, was both valid and indestructible; and, in spite of the dissent of some of the judges,[3] this view was finally sanctioned by *Manning's Case* (1609),[4] and *Lampet's Case* (1612).[5]

A short sketch of the history of this episode in this branch of the law was given by Lord Nottingham in the *Duke of Norfolk's Case*.[6] It is so lucid, and explains so well the nature of the equitable pressure which induced the final settlement, that I shall copy his words. After showing that no reason could be given to explain why an executory interest should not be created in a term as well as in a freehold, except the reason that it was merely a chattel, he proceeded as follows: "Now, as this is no reason in any other part of the world, so it is a reason that by this time begins to be quite exploded out of Westminster Hall, and most certainly can never take place in the Chancery. There was a time when this reason did so far prevail that all the judges of England, being assembled in Chancery, for the assistance of the Lord Chancellor *Rich*, declared the law to be, that if a lease be devised to A for life, and if A die, living B, B to have the residue of the term, this remainder is void; for in the consideration of the law the life of a man was a greater estate than any lease for years, though A had the whole term, so it was ruled, 6 *Edwd.* 6, *Dyer* 74. And the same opinion held current in other cases, until 10 *Eliz. Dyer* 277. But this being a reason against sense and nature, it was impossible for the world to be long governed by it; and *ergo*, in 15 *Eliz. Dyer* 328, the matter began to be a *quaere*, and in 19 *Eliz. Dyer* 358, it was adjudged the remainder was good, which is the same case with *Welden and Elkington's Case* in the Commentaries, *Plowden* 519. When the Chancery saw the judges of the common law begin to govern themselves by the true reason of the thing, and not by the vulgar reason of the books, they took a course to fix the judges in this opinion; for then it began to be a common suit in Chancery, for him who had the remainder of a term, to exhibit his bill against the devisee for life, to compel him to put in security not to bar the remainder; and it was often so decreed, 26 *Eliz. Price v. Jones* (*Toth.* 122); and again by my *Lord Ellesmere*, 5 *Jac.*, *Cole v. Moor*, *Sir Francis*

[1] "The remainder of a term devised to one for term of life is good by devise, but not by estate executed in the lifetime," *per* Welsh, Weston and Harper, JJ., Dyer 277b, cited Gray, op. cit. 120-121.

[2] Plowden 519; and, as Gray says, "in the thirty years following the same or a similar point was frequently decided in the same way," op. cit. 121 and n. 2.

[3] Above 129.

[4] 8 Co. Rep. 94b.

[5] 10 Co. Rep. 46b.

[6] (1681) 2 Swanst. at pp. 464-465.

Moor, 806, pl. 1093. At last, to prevent a Chancery suit, viz. *7 Jac.*, *Matthew Manning's Case* (8 Co. 94), and 10 *Jac.*, *Lampet's Case* (10 Co. 46), the judges came to be uniformly agreed that the remainder was good by way of executory devise, and that the devisee for life could not bar it. So now, at last, notwithstanding the exility of a term, and the meanness of a chattel interest, there may be a devise of it for life with executory remainders."

B. Executory interests in freeholds.

It is clear that this change of attitude on the part of the judges towards executory devises of terms of years, was bound, sooner or later, to react upon their views as to the rules to be applied to executory interests of freeholds. We have seen that these interests could be created either by way of use or by way of executory devise. They could take effect if they were not destroyed by those who had vested interests therein; but we have seen that the prevailing opinion was that they were destructible.[1] There are, however, two cases, decided at the very end of the sixteenth century, which seem to point to a tendency on the part of the judges to modify their views as to the destructibility of these interests. In 1599, in the case of *Smith v. Warren*,[2] a fine was levied to the use of the conusee and his heirs, on condition that he should pay an annuity to the conusor; and that, on default in payment, the conusor should hold for his life and one year over. The conusee enfeoffed Warren, who leased for years to the plaintiff. The annuity fell into arrear, and the conusor entered. It was held that, notwithstanding the feoffment, his entry was lawful. The decision went partly on the ground that the obligation to pay the annuity was "a charge or burden upon the land, which goes along with the land, in whose soever hands it comes";[3] but, as Gray says,[4] "the springing use was preserved under circumstances in which, according to *Chudleigh's Case*, a remainder limited by way of use would have been destroyed." In 1600, in the case of *Purslowe v. Parker*,[5] we have seen that it was admitted that an executory devise over, limited to take effect on the non-fulfilment of a condition in favour of unascertained persons, was destructible by a feoffment;[6] but it was held in that case that the executory devise over, being limited to ascertained persons, was not thus destructible. This distinction between the character of the contingency emerges, as Gray has pointed out, "for the sole time in the law."[7] Neither of these cases laid down a clear principle, and neither seriously affected the rule that these interests

[1] Above 128.
[2] Cro. Eliza. 688.
[3] At p. 689 *per* Glanville, J.
[4] Perpetuities 118.
[5] 2 Rolle Rep. at pp. 218-219.
[6] Above 128-129.
[7] Perpetuities 118 n. 4.

were destructible; but both, it seems to me, point to the fact that some at any rate of the judges were thinking of revising their views upon this matter.

The tendency to modify the rules of law on this matter must have been strengthened by the final decision in *Lampet's Case* in 1612 [1] that executory devises of terms were indestructible. If an executory devise of a term of years was indestructible, why should not an executory interest in freeholds be similarly indestructible? And, if the common law courts continued to hold such an interest to be destructible, might it not be feared that the court of Chancery would take measures to give relief, similar to the measures which it had taken in the case of bequests of terms of years? Was not this interference the more likely, now that the controversy between the common law courts and the Chancery over injunctions had been decided in favour of the Chancery? It was possibly on some such grounds as these that in 1620, in the case of *Pells v. Brown*,[2] the common law courts finally decided to reverse their older decisions and to hold that an executory devise of freehold was not destructible.

The facts of this case were as follows:—A testator devised land to A and his heirs, and if A died without issue in the lifetime of Brown the defendant, then to Brown and his heirs. A entered and suffered a recovery to the use of himself and his heirs. He afterwards died, having devised the land to the plaintiff's wife and her heirs. It was held by Montague, C.J., and Chamberlayne and Houghton, JJ., that the executory devise to Brown was not barred by this recovery, because he had not been vouched to warranty. It is clear that their judgment was based very largely on the hardship to testators of any other decision—a consideration which would naturally be present to the minds of judges who did not want to see any further interferences by the court of Chancery. "If," they said, "such recovery should be allowed, then if a man should devise that his heir should make . . . a payment to his younger sons, or to his executors, otherwise the land should be to them; if the heir by recovery might avoid it, it would be very mischievous, and might frustrate all devises; and there is no such mischief that it should maintain perpetuities, for it is but in a particular case, and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who hath such a contingency: and on the other part, it would be far more and a greater mischief, that all executory devises should by such means be destroyed." [3] The reasoning in this case applied to all contingent estates which were not

[1] 10 Co. Rep. 46b. [2] Cro. Jac. 590.
[3] Ibid at p. 593.

reversions or remainders;[1] and, in fact, since the decision in that case, the fact that all these executory interests, except executory interests limited to take effect after an estate in tail,[2] are indestructible,[3] otherwise than by the act of the persons entitled to them,[4] is admitted on all hands to be one of the leading differences between them and contingent remainders.

Thus the executory interests, both in terms of years and freeholds, which had come into existence as legal estates through the operation of the statutes of Uses and Wills, became interests which differed from legal contingent remainders, not only in the fact that they were free from the rigid rules which fettered the limitation of contingent remainders, but also in the fact that they were indestructible. These developments were due to a large extent to the pressure exercised by the competition of the court of Chancery. We shall now see that, besides exercising this influence, that court had been creating a new set of indestructible executory interests of an equitable variety.

(2) The developments made by equity.

After the passing of the statute of Uses, equity still had jurisdiction over uses not executed by the statute—uses of chattels real and personal,[5] uses of copyholds,[6] and uses where the feoffees had active duties to perform.[7] On this basis equity began to build up a new system of trust estates. Starting from the basis of the principles of the modern common law, it was able gradually to create a new set of equitable estates by way of trust, which, as Lord Mansfield said,[8] answered "the exigencies of families and all purposes without producing one inconvenience, fraud, or private mischief which the statute of Uses meant to avoid." The fact that equity was able to jettison a large amount of the mediæval law, which it had naturally followed in building up the law as to the uses now turned into legal estates by the statute, was the decisive cause of its success in building up this new branch of the law.[9]

[1] As Davenport said *arg.* in Pells v. Brown, "Le common recovery ne poet bar cest executory contingent estate; car coment que recoveries sont de grand force uncore ne poent bar estate in contingency, que ne sont reversions ou remainders," Palmer at p. 135, to which argument Chamberlaine, J., assented, ibid at p. 137.

[2] Fearne, Contingent Remainders (9th ed.) 423-425 and cases there cited.

[3] Lloyd v. Carew (1697) Shower, P.C., 147.

[4] Lampet's case (1612) 10 Co. Rep. at ff. 51b, 52a.

[5] Vol. iv 463.

[6] Rowden v. Maltster (1627) Cro. Car. at p. 44; Sanders, Uses (5th ed.) i 249-250.

[7] Vol. iv 463.

[8] Burgess v. Wheate (1759) 1 W. Bl. at p. 160.

[9] "The opposition [between a use and a trust] is not from any metaphysical difference in the essence of the things themselves. An use and a trust may essentially be looked upon as two names for the same thing; but the opposition consists in the practice of the court of Chancery. If uses, before the statute of Hen. 8, were considered as a pernancy of the profits, as a personal confidence, as a chose in action; and now trusts are considered as real estates, as the real ownership of the land; so

Partly by following its own conception of what was just and reasonable, partly by following the principles of the modern common law,[1] it was able to mould these new equitable estates in such a way that they satisfied modern needs. I have already said something of this process in connection with the development of the law as to ownership and possession;[2] and the developments which were taking place in that branch of the law were paralleled by the developments which were simultaneously taking place in the law as to these future equitable estates in the land.

The great impetus to the construction of these new equitable estates came when, in the latter half of the seventeenth century, equity began to enforce the use upon a use as a trust.[3] Since that time equitable executory interests, similar to legal executory interests, could be created whenever settlors and testators so wished; and also equitable contingent remainders, similar to, but differing in important respects from legal contingent remainders. Thus a number of new equitable interests came into English law, which presented points both of difference from, and resemblance to, parallel legal interests. These differences and resemblances were gradually developed during the latter half of the seventeenth and the eighteenth centuries; and of them I shall say something in the following section, in which the nature of the executory interests recognized by English law will be described. Here we may note that all these equitable interests were, like the shifting and springing uses and the executory devises recognized by the common law, indestructible. Hence the fact that the older rules against perpetuities no longer sufficed was emphasized. A new rule was needed to frustrate the endeavours of settlors and testators to use all these executory interests, legal and equitable, to create perpetuities. But with the growth of this new rule I cannot deal till the nature of these executory interests, and some of the ways in which they can be created, have been examined.

The Nature and Incidents of the Various Executory Interests known to English Law

By the end of the seventeenth century, the modern classification of the different executory interests known to English Law had been reached. The most important division is into those interests which are legal and those which are equitable; and it is

far they may be said to differ from the old uses; though the change may be not so much in the nature of the thing, as in the system of law made use of upon it," Burgess v. Wheate (1759) 1 W. Bl. at p. 155 *per* Lord Mansfield, C.J.

[1] Above 74-78.
[2] Ibid.
[3] Vol. vi 641-642.

under these two heads that I shall sketch shortly the history of this branch of the subject.

(1) Legal Interests.

These legal interests fall into two classes, according as they are called into existence by virtue of the statute of Uses or the statute of Wills.

(i) The legal interests called into existence by virtue of the statute of Uses are, firstly, the contingent uses, which, because they can take effect as contingent remainders, must so take effect.[1] As I have already dealt with the subject of contingent remainders no more need be said of this class. Secondly, there are shifting and springing uses which cannot take effect as contingent remainders. The difference between a shifting and a springing use turns upon the question whether the use does or does not "defeat an estate previously limited by the same instrument." Thus if an estate be limited to the use of A and his heirs till B return from Rome, and, on the happening of that event, to the use of X and his heirs, the use to X and his heirs is a shifting use, because it takes effect in defeasance of A's estate. On the other hand, if an estate be limited to the use of A and his heirs to take effect five years hence, or to the use of X for ten years, and then to the use of A and his heirs, in both these cases the use to A and his heirs is a springing use, because it does not defeat an estate previously limited by the same instrument.[2]

The nature and incidents of these shifting and springing uses depend, firstly, upon the circumstances and the manner in which the statute operates to confer the legal estate upon the persons entitled; and, secondly, upon the extent to which they resemble, and the extent to which they differ from the future estates known to the common law.

The circumstances and the manner in which the statute operates to confer the legal estate upon the persons entitled.

In considering the circumstances under which the statute operates to confer the legal estate upon the persons entitled, we must never lose sight of the principle that a use upon a use is not executed by the statute.[3] Two consequences follow from this. Firstly, unless a use is raised by a conveyance, such as a feoffment fine or recovery, which operates to "transmute"[4] the legal estate, that use will not be executed by the statute. A use

[1] Above 126-128.

[2] See Challis, Real Property (3rd ed.) 174; Sugden, Powers (8th ed.) 27; but the terminology, both in the eailier and the later authorities, is very uncertain; nothing really turns on the distinction.

[3] Vol. iv 468-473; vol. v 307; vol. vi 641-642.

[4] For the use of this term by Coke in this sense see above 120 n. 1.

raised upon a conveyance by bargain and sale or by covenant to stand seised, which itself takes effect by the operation of the statute of Uses, will not be executed, because it is in substance a use upon a use.[1] We have seen that this was the point decided in *Tyrrel's Case;*[2] and its application is abundantly illustrated in the reports. Thus it was said in *Dillon v. Fraine*,[3] "suppose a man bargains and sells land to one for his life by deed indented and enrolled, and make therein a proviso that the tenant for life may make leases, this is to no purpose as to power to make a lease." We shall see that it was not one of the least of the advantages of the bargain and sale for a year, followed by a release at common law, that it was possible to limit uses on this release which would take effect at common law.[4] Secondly, we have seen that the statute only operates if one person is seised to the use of *another*.[5] If, therefore, a feoffment was made to a feoffee to his own use, the feoffee was in by the common law, and the use was not executed.[6] But, as there was a use expressly limited, no further use could be limited upon it. Thus, it was said in 1563,[7] that if there is a feoffment to J. S. to his own use, and it is provided that he shall be seised to the use of R. H., this limitation to R. H. is void, because both the use and the possession were in J. S. before; and that it was the same as if a man had bargained and sold his lands, and limited a use upon the seisin of the bargainee.[8]

In considering the manner in which the statute operates to confer the legal estate upon the persons entitled, we must bear in mind that the scheme of the statute is to take the seisin from the feoffees and vest it in the cestui que use.[9] It is clear, therefore, that a seisin coextensive with that intended to be conferred

[1] See Sanders, Uses (5th ed.) ii 62; Sugden, Powers, (8th ed.) 12.
[2] (1558) Dyer 155a; vol. iv. 469-470.
[3] (1589-1595) Popham at p. 81.
[4] Below 362.
[5] Vol. iv 463.
[6] As Bacon said, Reading, Works vii 440, "The statute ought to be expounded that, when the party seised to the use and the cestui que use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law"; and he added, ibid 441, "Let me advise you of this, that it is not a matter of subtlety or conceit to take the law right, when a man cometh in by law in course of possession, and where he cometh in by the statute in course of use; but it is material for deciding many cases and questions; as for warranties, actions, conditions, waivers, suspensions and divers other purposes. For example, a man's farmer committeth waste; after, he in reversion covenanteth to stand seised to the use of his wife for life, and after to the use of himself and his heirs; his wife dies; if he be in of his fee untouched, he shall punish the waste; if he be in by the statute he shall not punish it."
[7] Anon. Moore at p. 46.
[8] "In the case of Pykes v. Mitford, Hale said that . . . whether the feoffees take by the common law or by the statute, yet where the use is once disposed of to them and their heirs (whether the statute executes it or not) there cannot be a use upon a use, nor a trust upon such an use to be executed by the statute," *per* Holt, C.J., Tipping v. Cosins (1695) Comb. at p. 313.
[9] Vol. iv 461-462.

upon the cestui que use must be vested in the feoffees.[1] This consequence of the operation of the statute was very early ascertained. This is clear from the following note in Dyer, which comes from the year 1561:[2] "Carus moved this case, *s.* A man gives land at this day to two, *habendum* to them for the term of their lives, and the life of the longer liver of them, to the use of A. B. for the term of his life without more; the two lessees die; whether the estate of A. B. be determined or not? And the Court thought that the estate is determined, because the estate on which the use is created and raised was gone." As Jones, Whitelock, and Croke, JJ., put it, "Where an estate is limited to one, and the use to a stranger, there the use shall not be more than the estate out of which it is derived."[3]

So far the principle is plain. But a speculative difficulty, of a kind which has always been attractive to real property lawyers, arose where land was conveyed to feoffees and their heirs to the use of A and his heirs, and then it was provided that, on the happening of an event, the use should shift to B and his heirs. It is quite clear that, on the happening of the event, the use would shift to B and his heirs—but how was this result brought about? Clearly the seisin of the feoffees had been exhausted in giving effect to the estate limited to A and his heirs. How then could they be seised to the use of B and his heirs? And, if they could not be seised to the use of B and his heirs, where did B's seisin come from? A similar difficulty arose if a feoffment was made to A and his heirs to the use of B for life, remainder to the use of his first son unborn in tail, remainder to X in fee. As the uses limited to existing persons exhaust the seisin given to A, how can he be seised to the use of B's son in tail if and when he is born?[4] It was these theoretical difficulties which started the great "scintilla juris" controversy.

It would seem that the phrase "scintilla juris" was invented by Dyer in *Brent's Case*,[5] to explain why (in a case where land had been limited to feoffees and their heirs to the use of A for life, remainder to the use of his unborn son in tail, remainder to the use of X and his heirs) the feoffees could, on the birth of the son, enter, if entry was necessary, to preserve the contingent use in his favour. "Although," it was said,[6] "by the words of the

[1] "If the use were limited to cestui que use and his heirs, and the estate out of which it was limited was but an estate for life, cestui que use can have no inheritance," Bacon, Reading, Works vii 428.

[2] Dyer 186a; this assumes that a tenant for life could be seised to a use on which, as we have seen (vol. iv 469 and n. 6), there was considerable controversy.

[3] Jenkins v. Young (1632) Cro. Car. at pp. 231, 245.

[4] Sugden, Powers (8th ed.) 18-19.

[5] (1575) Dyer 339b.

[6] Ibid at f. 340b.

statute, the freehold of the land, and the fee simple also which the feoffees receive, are deemed and vested in the *cestuys que use* before, yet there still remains some scintilla of right and title, as some medium between both states, *s.* that possibility of a future emerging use, and so an interest and title, and not only a naked authority or power remains." Or, as it is put in *Chudleigh's Case*,[1] "they conceived a possibility of entry should remain in the feoffee, which the Lord Dyer termeth *scintilla juris;* for if the feoffor has issue a son, then presently by the operation of the Act of 27 Hen. 8, the feoffees should have an estate to preserve this use." This theory was certainly approved by Coke and the majority of the judges in *Chudleigh's Case;* and it was easily applied to the first of the cases which are stated above, i.e. the case where land is limited to the use of A and his heirs, and, on the happening of an event, to the use of B and his heirs.

But, from the first, this theory did not pass unquestioned. In *Chudleigh's Case* Periam, C.B., and Walmesley, J., held, "that it would be against the meaning and letter of the law to say that any estate or right or *scintilla juris* should remain in the feoffees after the statute 27 Hen. 8 . . . and the Chief Baron said that *scintilla juris* is like Sir Thomas Moore's Eutopia."[2] Bacon, though he countenanced this theory in his argument in *Chudleigh's Case*,[3] condemned it in his Reading as "a conceit."[4] He held there that all "right and title" were taken from the feoffees, even though the uses, because they were contingent, could not be immediately executed; and, in his argument in *Chudleigh's Case*, he propounded a very different theory. "The statute," he says,[5] "succeeds in office to the feoffees. . . . Wherefore if the feoffees could not execute this (the use) before the statute, no more does the statute after: but when the contingent use comes *in esse*, at which time the feoffees can execute it, the statute wakes it." In other words, Bacon considered that the uses arose, in accordance with the intention expressed by the settlor, by the force of the statute,[6] unless as in *Brent's* and *Chudleigh's Cases*, they had been

[1] (1589-1595) 1 Co. Rep. at f. 129b; so too Bacon says, in his argument in Chudleigh's Case, Works vii 622, that Dyer founded his decision in Brent's Case on the scintilla juris theory—"which reason to be more memorable Mr. Dyer has put into Latin words: *adhuc remanet quædam scintilla juris et tituli, quasi medium quid inter utrosque status.* Which words are very significant. For the most proper sense is that, if two uses be limited, one to determine and the other to commence, between the cesser of the one and the rising of the other, the feoffees . . . receive the land from the one cestui que use and deliver it to the other, and have a right, in the sight of the law, between the two."

[2] 1 Co. Rep. at f. 132b.

[3] Works vii 622.

[4] Ibid 428.

[5] Ibid 624.

[6] Thus in his Reading, ibid 439, he says, "When I make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son (I having no son at that time) the remainder to my brother and his heirs: if my wife die before I have any son, the use shall not be in me, but in my brother; and yet, if I marry again

previously prevented from so arising by the acts of the parties having vested interests in the property.

In the eighteenth and early nineteenth centuries these two views as to the mode of the operation of the statute divided the conveyancers. Fearne[1] doubted the necessity for supposing any *scintilla juris* which would give the feoffees a right of entry, because he considered that the effect of the statute of Uses was to render their entry unnecessary.[2] Booth, on the other hand, was a firm supporter of the doctrine.[3] Sanders considered "the doctrine established upon principle and authority; and consequently that this possibility of seisin may be released or destroyed, or, by failure of heirs of the grantee to uses, become extinguished."[4] Lord St. Leonards, on the other hand, was its strenuous opponent. He maintained substantially the same view as that held by Bacon. No scintilla juris remains in the feoffees; but, as the result of the statute of Uses, the contingent uses, as and when they arise, take effect by virtue of the seisin originally vested in the feoffees.[5]

Hallam once said of the disputes of the Greek church "that the disputants, as is usual, became more positive and rancorous as their creed receded from the possibility of human apprehension."[6] It would be no doubt quite untrue to say that the temper of any of the eminent conveyancers who took part in this dispute was rancorous. But the belief of Lord St. Leonards was so positive that, after three ineffectual attempts, he induced the Legislature[7] in 1860 to enact that, where any hereditaments have been limited to uses, whether immediate or executory, these uses shall take effect, when they arise, by force and in relation to the estate of the persons seised to the uses; that the continued existence in them of any *scintilla juris* shall not be deemed necessary for the support of the executory uses; and that such *scintilla juris* shall not be deemed to remain in them or elsewhere.[8] When the sovereign Legislature pronounces upon such points of legal doctrine as these, it may flatter itself that it is fulfilling the useful function,

and have a son, it shall divert from my brother, and be in my son; which is the skipping they talk so much of"; this seems to be the view which is taken by Mr. Heath of Bacon's views on this topic, see Works vii 446-447.

[1] Contingent Remainders (9th ed.) 300-301.

[2] "I think that a little attention to the apparent operation of the statute of uses in relation to this point, will be sufficient to prevent our too hastily admitting a doctrine, which, without the aid of metaphysical subtleties, seems hardly reconcileable to the express force of that statute," ibid 301.

[3] Sanders, Uses i 112 n.

[4] Ibid 112-113.

[5] Sugden, Powers (8th ed.) 19-20.

[6] Hallam, Middle Ages, ii 120.

[7] "After three ineffectual attempts of the writer to obtain legislative authority on this point, the House of Commons was at last prevailed upon to agree with the House of Lords," Sugden, Powers (8th ed.) 20.

[8] 23, 24 Victoria c. 38 § 7.

assigned in the theological economy of the Roman Church, to the infallible pope.

The extent to which these estates resemble, and the extent to which they differ from the future estates known to the common law.

The incidents of the estates created by shifting and springing uses were, as we have seen, mainly the result of a compromise between those who thought that they should be as free from all the common law rules of limitation as were uses before the statute of Uses, and those who thought that the uses executed by the statute should be subjected to all the rules which applied to future interests at common law.[1] Hence these estates in some of their incidents resemble, but in some of the most important of their incidents differ from, the future interests recognized by the common law.

They resemble the future interests recognized by the common law in the following respects:—Firstly, although before the statute of Uses a fee simple in the use might pass, if the parties so intended, without words of inheritance,[2] words of inheritance were required after the statute to pass a fee simple in a use executed by the statute;[3] and the same principles apply to the limitation of an estate tail.[4] Secondly, a man may, contrary to the rule of the common law, so limit the use that the heirs of his body take as purchasers;[5] but, even by way of use, he cannot "enable his heir general to take as purchaser under a limitation to his heirs."[6] Thirdly, the following two rules regulating the limitation of future estates at common law apply to shifting and springing uses: (*a*) The rule that "a condition or limitation to an estate of land ought to destroy the whole estate to which it was annexed and not part of it," was applied to limitations by way of use.[7] Therefore it was held that if a use was limited to A in tail, with a proviso that if he did a certain act the estate tail should cease during his life, this proviso was void.[8] We shall see that this rule was of great practical importance in the sixteenth century, owing to the fact that landowners attempted to establish perpetuities by means of these provisos.[9] (*b*) In *Corbet's Case* Walmesley, J., said,[10] "that if a man makes a feoffment in fee of land to the use of A and his heirs every Monday, and to the use of B and his heirs every Tuesday, and to the use of C and his

[1] Above 125. [2] Vol. iv 438.
[3] Abraham v. Twigg (1596) Cro. Eliza. 478; Corbet's Case (1599-1600) 1 Co. Rep. at f. 87b.
[4] Ibid. [5] Co. Litt. 22b.
[6] Sanders, Uses i 138, citing Fenwick v. Mitforth (1590) Moore 284, and Co. Litt. 22b.
[7] Corbet's Case (1599-1600) 1 Co. Rep. at f. 86b.
[8] Ibid. [9] Below 205-206. [10] 1 Co. Rep. at f. 87a.

heirs every Wednesday, these limitations are void, for we do not find such fractions of estates at law." This principle, it was admitted, did not apply to certain incorporeal hereditaments;[1] but, in the sixteenth century, there was a very good practical reason why it should be applied to the limitation of corporeal hereditaments. "If one might limit estates in land to cease, during the minorities of the heirs, and other persons to have the land during that time, then all wardships may be defeated."[2]

These interests differ from future interests recognized by the common law in the following respects:—Firstly, we have seen that a man might convey a future interest to himself or his wife,[3] or to the heirs of his body.[4] "Though, at the common law, a man cannot be donor and donee, without he part with the whole estate, yet it is otherwise upon a covenant to stand seised to uses"[5]—or upon any other conveyance to uses. Secondly, a joint tenancy may be created by way of use though the unity of time is not observed.[6] Thirdly, the most important differences arise in respect of the rules for the limitation of these estates. Thus we have seen that they were ultimately held to be indestructible by those having vested interests in the land;[7] that they could be limited to begin in futuro;[8] that they could be limited to shift on conditions which defeated the precedent estate without awaiting its regular ending;[9] and that by their means a fee could be limited on a fee.[10]

(ii) The legal interests called into existence by the statutes of Wills are executory devises. An executory devise has been defined as, "such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory bequest), as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law."[11] We have seen that only those devises which could not take effect as contingent remainders fell within this definition, because any future interest, which could take effect as a contingent remainder, must so take effect.[12] The differences between contingent remainders and executory devises are clearly marked. They are concisely summed up by Fearne as follows:[13]—"A contingent remainder may be limited in con-

[1] It does not, for instance, apply to a rent or a common newly created, 1 Co. Rep. at f. 87a *per* Walmesley and Glanville, JJ., cp. Fearne, Contingent Remainders (9th ed.) 526-527.
[2] 1 Co. Rep. at f. 87b. [3] Vol. iv 474. [4] Above 141.
[5] Southcot v. Stowel (1674) 2 Mod. at p. 211; cp. Sugden, Powers (8th ed.) 25-26.
[6] Mutton's Case (1572) Moore 96; Sammes's Case (1610) 13 Co. Rep. at pp. 56-57.
[7] Above 132-134. [8] Above 122, 124; Sanders, Uses i 141-143.
[9] Above 122; Sanders, Uses i 155.
[10] Above 122, 123; Sanders, Uses i 149, 150.
[11] Fearne, Contingent Remainders (9th ed.) 386.
[12] Above 127. [13] Op. cit. 418.

veyances at common law; it relates only to lands, tenements, and hereditaments real or mixed; it requires a freehold to precede and support it, and must vest at farthest at the instant the preceding estate determines. An executory devise is admitted only in last wills and testaments; it respects personal estates as well as real; it requires no preceding estate to support it; and if there be any preceding estate, it is not necessary that the executory devise should vest, when such preceding estate determines."

It is clear, therefore, that there may be executory devises in freeholds, in terms of years, and in pure personalty. The last named differ from the two first in that, unlike the two first, they take effect, as a rule, only as equitable estates.[1] The first two can take effect as legal estates without the interposition of trustees.[2] We have seen that, by the beginning of the seventeenth century, these executory devises of freeholds and terms were not only recognized by the common law, but had been allowed to be indestructible by those taking vested interests in the land.[3]

Executory devises of freeholds are essentially similar in their incidents and nature to shifting and springing uses. It is clear from the decisions of the sixteenth and early seventeenth centuries, that an executory devise could be limited in futuro,[4] and that it could be limited after a preceding fee simple;[5] and these principles were treated as well settled in the latter half of the seventeenth century.[6] It was not, however, till the eighteenth century that it was settled that an executory devise to a non-existent person per verba de praesenti—i.e. to a non-existent person as if he were in existence, was valid, though it was admitted that such a devise was valid per verba de futuro—i.e. to a non-existent person when he came into existence.[7] The same rule seems to have been formerly applied to executory devises of terms.[8] Probably it originated in an extension of the rule, which was long applied to, and is perhaps still law, in the case of a contingent remainder to a non-existent person.[9]

Executory devises of terms differ from executory devises of freeholds in one or two respects, which are traceable ultimately to the outstanding differences between chattels real and real property. Firstly, a term cannot be entailed; and therefore a devise

[1] For the history of the law on this point see below 472-478.
[2] Fearne, op. cit. 413; above 130-134. [3] Ibid.
[4] Pay's Case (1602) Cro. Eliza. 878; above 123.
[5] Wellock v. Hammond (1591), cited 3 Co. Rep. at f. 20b; above 123.
[6] Clarke v. Smith (1699) 1 Lut. at p. 798; Hanbury v. Cockerell (1650) 1 Rolle Ab. 835 pl. 4; and see Fearne, op. cit. 395-396; as Fearne says, ibid at p. 503, "Every executory devise [of a freehold] is either the limitation of an estate after the fee has already been disposed of, or else is a freehold to commence in futuro without any preceding freehold to support it."
[7] Ibid 532-536. [8] Ibid 495. [9] Above 99.

to X and the heirs of his body will give the whole term to X. It was settled in the *Duke of Norfolk's Case*,[1] following *Leventhorp v. Ashbie*,[2] and overruling Coke's dictum in *Leonard Lovie's Case*,[3] that a devise of a term to one and the heirs male of his body was "an absolute disposition of the term." But, secondly, though, as in the case of freeholds, such words as heirs or heirs of the body are in substance words of limitation, in that they vest the whole estate in the first taker,[4] yet this rule is not, as in the case of freeholds, a rule of law,[5] but merely a rule of construction, which may give way to an intention shown in the will to treat these words as words of purchase.[6] Thirdly, it was a rule recognized in the Year Books[7] that an express devise to some other person was needed to oust the heir. Therefore if, pending the vesting of an executory devise, the freehold is not disposed of, it descends to the heir.[8] But if a term were devised to A, and there was an executory devise over, and an interval occurred between the termination of A's interest and the vesting of the interest of the executory devisee, the profits accruing during this interval were accumulated, and went to the executory devisee.[9] We shall see that this principle played some part in the decision in favour of Peter Thellusson's will, in the famous case of *Thellusson v. Woodford*.[10]

Finally, it should be noted that all these future legal estates are transmissible, like contingent remainders,[11] to the heirs or representatives of the person to whom they are limited.[12] Like contingent remainders, they were originally neither devisable,[13] nor assignable inter vivos.[14] But, as in the case of contingent remainders, the common law came to recognize their devisability,[15] and equity has always recognized their assignability.[16]

(2) Equitable interests.

We have seen that the future interests in land recognized by equity, after the passing of the statute of Uses, were modelled on the modern common law and on modern needs; and not on the

[1] (1681) 3 Ch. Cas. at p. 30.
[2] Rolle, Ab. *Devise* 611.
[3] (1614) 10 Co. Rep. at f. 87a.
[4] Fearne, op. cit. 490.
[5] Below 395-396.
[6] Fearne, op. cit. 492.
[7] Y.BB. 9 Hy. VI. Trin. pl. 19 pp. 24-25 *per* Paston, J.; 15 Hy. VII. Trin. pl. 22 p. 12 *per* Fineux, C.J., and Rede and Tremaile, JJ.
[8] Pay's Case (1602) Cro. Eliza. 878; Clarke v. Smith (1699) 1 Lut. at p. 798.
[9] Sudholme v. Hodgson (1734) 3 P. Wms. at pp. 305-306; Fearne, op. cit. 545-546.
[10] (1805) 11 Ves. at pp. 146-148; below 229.
[11] Above 102.
[12] Fearne, op. cit. 551-561.
[13] Above 103.
[14] Fulwood's Case (1591) 4 Co. Rep. at f. 66b.
[15] Above 104; that a contingent interest in a term could be devised was recognized in Child v. Baylie (1620) 2 Rolle Rep. at p. 129; for the law as to freeholds see Roe v. Jones (1788) 1 Hy. Bl. 30.
[16] Above 104; Fearne, op. cit. 548.

mediæval law, on which the equitable rules as to uses before the statute had been modelled.[1] We have seen that the mediæval use originally bound only the feoffees; but that, before the statute, it had come to bind anyone taking the estate from or through the feoffees, except a purchaser for value without notice of the use.[2] But, because it bound the estate of the feoffees, it could not be enforced against anyone who could show a title to the land otherwise than from or through the feoffees. Such a person was not bound by the use; so that, e.g. a disseiser, an abator, an intruder, a lord taking a feoffee's estate by escheat, and a person acquiring the land by title paramount to that of the feoffees, was not bound by the use.[3] The use was a confidence or trust, which bound the conscience of the feoffees and anyone who took their estate in the land from or through them. It could not bind the land itself; for that was repugnant to the idea that it was based on confidence or trust—"it is absurd to say that confidence and trust can be reposed in land which wants sense, and which in regard of sense is inferior to brute beasts."[4] If the land itself was regarded as bound, it would, Coke argued, overthrow all the established rules as to the capacity of persons to be seised to a use; for in that case "a person attainted, an alien, the king, a corporation, the lord taking by escheat, might be seised to the use of another."[5]

In moulding these new equitable estates equity retained some of these principles. Thus it allowed that a person who took the legal estate from a trustee, without notice of the trust, got a good title both at law and in equity.[6] If a trustee's estate were barred by a fine and non-claim, the right of the cestui que trust was also barred.[7] Necessarily also a person who recovered the land by a title paramount to that of the trustee got a title free from the trust. But, in other respects, equity departed to some extent from the view that it was only the estate of the feoffees which was bound, and went some distance in the direction of holding that the land itself was bound. As Lord Mansfield said in *Burgess v. Wheate*,[8] "An use or trust heretofore was (while it was an use) understood to be merely an agreement, by which the trustee and all claiming from him in privity were personally liable to the cestuy que trust, and all claiming under him in like privity. Nobody in the post was entitled under, or bound by the agreement. But now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance. . . .

[1] Above 74-78, 135. [2] Vol. iv 432. [3] Ibid 432-433.
[4] Chudleigh's Case (1589-1595) 1 Co. Rep. at f. 127a. [5] Ibid.
[6] Pilcher v. Rawlins (1872) 7 Ch. Ap. 259; Ashburner, Equity 73-75.
[7] Wolstan v. Aston (1669) Hardres 511; Willis v. Shorrall (1738) 1 Atk. 474; Sanders, Uses i 297-298.
[8] (1759) 1 W. Bl. at p. 162.

There is no distinction now between those in the per and the post. . . . As the trust is the land in this court, so the declaration of trust is the disposition of the land."[1] It is by looking at the practical consequences of this changed conception of the nature of a trust, that we can see most clearly the great difference between the old use and the modern trust; and therefore between the mediæval and the modern conception of an equitable estate in the land.

Firstly, the modern law diverges from the mediæval in the fact that a trust may exist though there is no trustee. No use could be declared without a feoffee to hold to the use; but, as the modern trust is regarded as attaching to the property, equity will supply the place of a trustee. Thus, where property was devised to the separate use of a married woman, and no trustees were appointed, it was held that the husband, who took the property at law, was trustee for his wife.[2] Secondly, equity did not consider itself bound by the rules which disabled certain persons from being bound by a trust.[3] Both the king and a corporation could be trustees.[4] Thirdly, unlike the cestui que use, whose interest was affected by all the legal incidents which befell the estate of his feoffee,[5] the cestui que trust is "protected against his judgments and other incumbrances, and against his bankruptcy, and from the dower and freebench of his wife, and from the tenancy by the curtesy of the husband of a female trustee."[6] How far the cestui que trust was protected against the escheat or forfeiture of the legal estate, if the trustee committed felony or treason, was, as we have seen, long a doubtful question, till it was dealt with by the Legislature.[7] There were similar doubts in the case of escheat from the failure of the heirs of the trustee, till these doubts also were resolved by the legislation of the nineteenth century.[8] It is clear, however, that the view of those who held that the interest of the cestui que trust was not affected by these events, was based ultimately on the view that the trust bound the property itself, and not the trustee's interest in it. Fourthly, we shall see that the new conception had an important influence upon the treatment by equity of powers of appointment.[9] Lastly, it may be noted that the treatment by equity of covenants running with the land differs from the treatment of these covenants by the common law, precisely in this respect; for while equity regards them as running with the land, the common law regards them as running with the estate in the land held by the tenant who has entered

[1] For this use of the terms "in the per," and "in the post," which were borrowed from the writs of entry (vol. iii 13), see vol. iv 433 n. 1.
[2] Bennet v. Davies (1725) 2 P. Wms. 316; Sanders, Uses i 389.
[3] Vol. iv 427-428.
[4] Sanders, Uses i 389.
[5] Vol. iv 422.
[6] Sanders, Uses i 391.
[7] Vol. iii 71-72.
[8] Ibid.
[9] Below 171-176, 184-190.

into the covenant. An important development of the modern equitable idea was made in 1906, when the court of Appeal held that a squatter was bound by a covenant which ran with the land in equity.[1] This decision was, as Williams has pointed out, and as we have seen, wholly contrary to the principles applied to uses;[2] but it is a logical result of these developments, partly judicial and partly legislative, which have all tended in the direction of attaching the trust rather to the land than to the trustees' interest therein.

But, though the decisions of the court of Chancery thus introduced considerable modifications into the old law that the use bound only the trustees' interest, and though they consequently modified the incidents of the estate of the cestui que trust much to his advantage, they could not give full effect to this new idea without the help of the Legislature. The legislation of the nineteenth century on the subject of the escheat and forfeiture of the trustee's estate[3] is one illustration of this fact. Further illustrations can be found in statutes which have enabled trustees or the court to convey the trust property, when the trustees cannot deal with it, by reason of infancy lunacy coverture or absence beyond the sea.[4]

This development of the law began at the end of the seventeenth century. In its origin it owed much to Lord Nottingham; and his successors, working upon the foundations which he laid, have given these equitable interests their modern form. Although they have preserved many of the salient features of the equitable ownership, worked out in connection with uses before the statute of Uses, they have given to these equitable interests a distinct character of their own. A glance at (i) their resemblances to, and (ii) their differences from, the executory interests in the land recognized by the common law, will make this clear.

(i) *Resemblances.*—As a general rule the words of limitation, which are necessary for the creation of legal estates, are necessary also for the creation of equitable estates. "In limitations of a trust either of real or personal estate," said Lord Hardwicke,[5] "the construction ought to be made according to the construction of limitations of a legal estate." But there is this difference, namely that the effect of the words used will be varied, if the settlor's or

[1] In re Nisbet and Pott's Contract [1906] 1 Ch. 386; cp. Maitland, Equity 170, "this equity is enforced against one who is not a party to the transaction creating the equity, and who does not claim through or under any party."

[2] Real Property (22nd ed.) 183 n. (*t*). [3] Vol. iii 72.

[4] 7 Anne c. 19; 9 George IV. c. 74; 11 George IV. and 1 William IV. cc. 47 and 60; 4, 5 William IV. c. 23; 5, 6 William IV. c. 17; 1, 2 Victoria c. 69; 2, 3 Victoria c. 60; for an account of these statutes see Sanders, Uses (5th ed.) i 397-421.

[5] Garth v. Baldwin (1755) 2 Ves. Sen. at p. 655.

testator's intention to use them in another sense is clear.[1] Thus, to create an estate in fee or in tail, words of inheritance are dispensed with, if there is a clear intention to create such an estate.[2] The same rules of devolution on death apply to them;[3] and the husband is entitled to curtesy from them;[4] but we have seen that the wife, on account, as Blackstone says,[5] of a "cautious adherence to some hasty precedents," is not entitled to dower.[6] They can be assigned inter vivos and devised.[7] It was settled at the end of the seventeenth century that equitable estates tail could be barred by a recovery;[8] but, till Lord Hardwicke decided in the case of *Kirkham v. Smith* that a recovery was necessary,[9] there was some authority for saying that they could be barred by feoffment,[10] bargain and sale,[11] or even by will.[12] Though the statutes of limitation did not apply to suits in equity, yet courts of equity have, as we have seen, treated length of time as a bar to equitable claims, and have even come to accept twenty years adverse possession as giving a title to an equitable estate.[13] We have seen that some of the clauses of the statute of Frauds have, in the interests of creditors, made them liable, like legal estates, to be taken in execution; and have provided that they should be assets by descent in the hands of the heirs, in the same way as if they had been legal estates.[14] The growing importance of these interests at the date of the statute of Frauds (1677), is illustrated by the clauses of the statute which prescribe formalities for their creation and assignment, and for their disposition by will.[15]

(ii) *Differences.*—Firstly, we have seen that one of the chief differences between rules applicable to legal and equitable estates, was caused by the fact that equity refused to allow the acquisition or transfer by wrong of any equitable estate. No conveyance by an equitable owner of an equitable estate could have any tortious operation.[16] Secondly, as the legal seisin was held by the trustees,

[1] Garth v. Baldwin (1755) 2 Ves. Sen. at p. 655; of course different principles apply if the trust is executory, Sanders, Uses i 281 n. 8.

[2] Williams, Real Property (22nd ed.) 186, citing Shep. Touchstone (Preston's Ed.) 106, and later authorities.

[3] Sanders, Uses i 280-281; see vol. iv 437 for similar rules in the case of the use.

[4] Vol. iii 188.

[5] Comm. iii 337.

[6] Vol. iii 169.

[7] Sanders, Uses i 283-284

[8] Lord North and Champernoon v. Williams (1681) 2 Ch. Cas. 64; in that case Lord Nottingham cited a case in which Bridgman, L.K., had come to the same decision, S.C. 1 Vern. at p. 14.

[9] (1749) Ambler 518.

[10] Bowater v. Elley (1696) 2 Vern. 344.

[11] Beverley v. Beverley (1689) 2 Vern. 131.

[12] Woolnough v. Woolnough (1703) Prec. in Ch. 228. These opinions may have originated in the opinion expressed by Lord Nottingham in Lord North and Champernoon v. Williams (1681) 2 Ch. Cas. 64, that an equitable tenant in tail could bar his issue by feoffment or bargain and sale.

[13] Above 76-77.

[14] Vol. vi 386.

[15] Ibid 385-386; below 368.

[16] Above 75.

there could never be an abeyance of the seisin which would cause a future equitable interest to fail.[1] Thirdly, though equity ultimately allowed a stranger, by twenty years adverse possession, to acquire a title to the equitable estate,[2] it never allowed time to operate as a bar as between an express trustee and his cestui que trust.[3] As between them there could be no adverse possession. If the trustee acquires possession it is for the benefit of the cestui que trust; and the cestui que trust is tenant at will to his trustee.[4] It followed from this that a fine levied by the cestui que trust could have no operation on the legal estate.[5] Fourthly, in applying the legal doctrine of merger, the court of Chancery looked at the real facts of the situation, and allowed it to operate or not in accordance with the beneficial interests and intentions of the parties entitled to the property.[6]

These few illustrations will show that equity has created a new set of executory interests in the land, which fall into a very distinct class. I shall have more to say of the evolution of their incidents when, in the next Book of this History, I deal with the evolution of the principles of equity.

The development of these various executory interests, legal and equitable, added immensely to the powers of landowners over their property. Either by acts inter vivos or by will they could make elaborate laws for its future devolution. We shall now see that these powers were added to by the simultaneous development of several different kinds of powers of appointment. We shall see that some of these powers of appointment, because they gave enlarged facilities for disposition to limited owners under these settlements, helped to counteract the worst consequence of this system of settlement—the continued occupation of the land by persons with very limited rights of disposition and of user. They contributed an element of elasticity to the rigid laws of those settlements by which the majority of the great estates in England had come to be fettered; and we shall see that, in some cases, the rights conferred by them gave their owners what in substance amounted to a new variety of future interest in the land.

§ 5. Powers of Appointment

A power, in its widest sense, is an authority or mandate given by one man to another to do some act on his behalf. The

[1] Chapman v. Blissett (1735) Cases t. Talbot at p. 151; Abbiss v. Burney (1881) 17 C.D. at p. 229.
[2] Above 76-77. [3] Sanders, Uses i 313. [4] Ibid 313, 316.
[5] Earl of Pomfret v. Lord Windsor (1752) 2 Ves. Sen. at p. 481.
[6] Sanders, Uses i 316-317, 330-335.

bestowal of such an authority or mandate to act on behalf of another, and the bestowal of a proprietary right on another, are obviously distinct operations, which fall under two quite distinct juridical categories. A power gives to the person on whom it is bestowed an authority or mandate to do some act, either for his own, or for someone else's benefit. On the other hand, the gift of a proprietary right bestows no authority to do anything—it simply gives the recipient the rights of an owner. The distinction is clear enough if we look at such powers as e.g. a power of attorney, which merely bestow an authority or mandate to do some specified act or acts on behalf of another.[1] But if the authority or mandate bestowed is an authority or mandate to create new, or to revoke or suspend existing interests in property, either in favour of the recipient of the authority, or in favour of other persons, it is clear that these two very distinct things—power and property—will begin to approach one another. A person to whom a power has been given to confer a proprietary interest on himself is in effect given something like a right of property; and, if he has been given a power to confer a proprietary right upon a third person, he is in effect enabled to create a proprietary right in favour of that person, for the ultimate benefit, either of the donee of the right, or of himself, or of both. It is these powers to confer proprietary rights with which we are here concerned. We shall see that, from the sixteenth century onwards, many different varieties have been developed.[2] Without ceasing to possess many of the juridical qualities of authorities or mandates, they have all developed, some to a greater and some to a less degree, proprietary characteristics. But, because they are authorities or mandates, and have never ceased to possess many of their juridical qualities, they have added materially to the disposing capacity of landowners, and indeed to the owners of all sorts of property of a permanent kind. For this reason they have been the means of increasing the flexibility and adaptibility of the land law; and, consequently, they have added to it a new and important chapter.

The origins of this chapter in the history of the land law we must seek, partly in the common law, and partly in the flexible rules as to uses developed by the court of Chancery at the close of the mediæval period. We have seen that, in those rare cases in which lands were devisable at common law, the law recognized that the landowner could, without devising any estate in the land to his executors, give them a power to sell his lands;[3] and we shall

[1] "In the case of a common letter of attorney, no seisin is created, nor does the *estate* pass by or by virtue of the power, which merely authorizes the attorney to *convey* the estate in the name of the principal," Sugden, Powers (8th ed.) 199.

[2] Below 153-164, 164-175.

[3] Vol. iii 136-137, 274; below 153.

see that, where such a power had been conferred, they could convey the land by bargain and sale.[1] Thus, in this one case, the common law recognized the existence of a power to deal with another's property, vested in a person who had no proprietary right in that property. We have seen, too, that the court of Chancery recognized that a cestui que use could either reserve to himself, or give to another, a power to request his feoffees to hold the property to the new uses appointed either by himself or by his nominee.[2] The statutes of Uses and Wills immensely increased the sphere and importance of both these varieties of powers. As the result of the statute of Uses, the estates called into existence by the exercise of powers to revoke old uses and declare new uses on the seisin of the feoffees became legal estates.[3] For this reason the common law began to acquire a body of doctrine as to the creation and extinguishment of these powers, and as to the effect of their exercise. As the result of the statutes of Wills, the common law power of sale which could be given to executors, acquired a much extended operation;[4] and the wide powers of devising, conferred by these statutes, enabled testators to create many other varieties of powers, taking effect, either by force of these statutes, or, if the testator so desired, by the operation of the statute of Uses.[5] Thus these powers to appoint estates in the land began to be developed by the common law. But their main development came from the court of Chancery. In that court they were developed as an adjunct, and, as we shall see, a necessary adjunct, to the enlarged capacity which landowners had acquired of making settlements of, or of otherwise dealing with, their estates.

As thus developed they were employed extensively by the conveyancers in two main directions. Firstly and chiefly, they were employed to correct the two main defects of a strict settlement of property. The defect that the whole property was made to devolve on the eldest son, leaving the widow and younger children unprovided for, could be obviated by the giving to the father or mother powers to charge the property with sums of money for the widow's jointure, and for portions for the younger children. The defect that the common law powers of a life tenant under such a settlement were not sufficient to enable him to deal with the property to the best advantage, was obviated by the giving to the life tenant powers to lease, and to do other things which were needed to enable the property to be used profitably. Secondly, they were employed in connection with the law of mortgage, as developed by the court of Chancery, partly to give

[1] Below 153. [2] Vol. iv 474-475. [3] Ibid 475.
[4] Below 155. [5] Above 120-121.

extended powers to the mortgagee, and partly to enable the mortgagor or mortgagee to grant leases, in order that the existence of the mortgage might not hinder the development of the mortgaged property.

As early as the middle of the seventeenth century it was beginning to be clear that, as the result of the extensive employment of powers in connection with family settlements, these powers were becoming something more than mere authorities to act—that, through the joint efforts of the courts of common law and equity, they were becoming proprietary interests of a new and a peculiar kind. In 1663 this fact was clearly stated by Bridgman, C.J., in the case of *Grange v. Tiving*.[1] "Powers," he said, "are *novum compositum* . . . of a mixed nature; something they partake of the nature of the legal estate of the land, something of the nature of an use; in some things they must have construction, as cases at common law; and in other things the construction must be according to equity, and the courts of Chancery, whence they are by the Stat. 27 H. 8 transplanted." In fact, these powers, as thus developed by the common law and by equity, and applied by the conveyancers, have been found to be so necessary an adjunct to the land law that, in the last century, they were greatly extended by the Legislature, when it wished, in the public interest, both to increase the powers of the owners of settled land, and to simplify conveyances.[2]

The diverse origins of these powers of appointment necessarily gave rise to differences in their modes of operation. By degrees these different powers were classified into distinct types, the differences between which turn mainly upon the extent to which they approximate to a mere mandate or authority, and the extent to which they approximate to a proprietary right, and sometimes to a proprietary right of a fiduciary character. This process of classification was effected, partly by the efforts of the courts of law, and partly by the efforts of the court of Chancery. The result was the growth of a complex mass of legal and equitable rules, which govern the creation and exercise, and the revocation suspension and extinguishment, of various kinds of powers. It is not the function of legal history to deal, even in outline, with these rules. All that I shall attempt is to show how the main rules governing these various types of powers have been shaped, sometimes on the analogy of a mandate or authority, and sometimes on the analogy of a proprietary right; and how these rules, thus shaped, have affected the development of the land law. I shall therefore deal with the history of powers under

[1] O. Bridg. at p. 112.

[2] Below 161-164.

the following heads: The Origins of Powers and their Modes of Operation; Classifications of Powers; the Proprietary and the Mandatory Aspects of Powers.

The Origins of Powers and their Modes of Operation

In modern law powers can, from the point of view of their origins and modes of operation, be divided into four classes: common law powers; powers taking effect by means of the statute of Uses; equitable powers; and modern statutory powers. In this order, which is the chronological order in which they made their appearance in English law, I shall sketch the history of the growth of these four classes of powers, and describe the different modes of their operation.

(1) *Common law powers.*

We have seen that in those few localities in which, in the Middle Ages, a custom to devise was recognized, the common law permitted a man to give to his executors by his will a power to sell his land, without giving them any estate in the land.[1] Until such a power was exercised the estate devolved on the heir;[2] but, on its execution, the estate passed to the purchaser;[3] and, when Littleton wrote, the executors might oust the heir, and make a feoffment to the purchaser.[4] But they had no estate by the will—only a bare power;[5] and so they might, without entry, bargain and sell to the purchaser, who thereupon acquired the right to enter;[6] and this was always the method by which they exercised this power in later law.[7] In either case the purchaser was "in by the devisor."[8]

As this power was usually conferred by a will, it was generally conferred on executors. It was doubtless for this reason that, if a testator conferred such a power, without stating by whom it was to be exercised, the law presumed that it was to be exercised by his executors;[9] and this presumption was

[1] Vol. iii 136-137, 274.

[2] Litt. § 169; Y.BB. 9 Hy. VI. Trin. pl. 19 (p. 24) *per* Paston, J.; 15 Hy. VII. Trin. pl. 22 *per* Fineux, C.J., and Rede and Tremaile, JJ.; Co. Litt. 236a.

[3] Y.B. 9 Hy. VI. Trin. pl. 19 (p. 24) *per* Paston, J.

[4] "The executors after the death of the testator may sell the tenements so devised them, and put out the heir etc., and thereof make a feoffment, alienation, and estate, by deed or without deed, to them to whom the sale is made," Litt. § 169; and cp. Y.B. 11 Hy. VI. Mich. pl. 28 p. 13 *per* Newton; Perkins § 541; Daniel v. Upley (1625) Latch at p. 43 *per* Dodderidge, J.

[5] Co. Litt. 113a, 181b, 236a.

[6] Y.B. 9 Hy. VI. Trin. pl. 19 (p. 24); cp. Co. Litt. 111a and 113a—these passages would seem to show that the devise plus the sale would amount to a devise to the purchaser, and so give him a right to enter.

[7] 1 Rolle, Ab. 329 pl. 13; Elphinstone, Practical Introd. to Conveyancing (4th ed.) 79.

[8] Co. Litt. 113a.

[9] Y.B. 15 Hy. VII. Trin. pl. 22 (p. 12) *per* Rede, Tremaile, and Frowick, JJ.

justified on the ground that the money arising from the sale was assets in the hands of the executors.[1] But a testator could confer this power on other persons. It was recognized in 1500[2] that he could confer the power on his feoffees to uses, or on any other person. But if the power, whether expressly or by implication, was conferred on the executors, their authority came direct from the testator, and was vested in them as *personæ designatæ*.[3] For this reason the power could only be exercised by them all, whether or not they proved the will, or even if they renounced probate.[4] But this rule was found to be so inconvenient in practice, that it was enacted in 1530 that a sale made only by those executors who accepted office should be valid.[5]

The rule modified by this statute illustrates the fact that this power to sell conferred by a will was strictly a power—a personal authority given by a testator to the person or persons nominated to do the particular act, i.e. sell. It followed, firstly, that it was only the persons to whom it was given who could execute it. Thus, if a man had given an authority to his feoffees to sell, it was only they who could sell.[6] Secondly, it followed that a wrongful disposition of the property by the persons to whom the power was given, could not prejudice a subsequent exercise of the power. Thus if feoffees, to whom a testator had given a power to sell, made a feoffment to another to the same use, i.e. to sell, the second feoffees could not execute this use; and the first feoffees, notwithstanding the feoffment, could still exercise the power.[7] Thirdly, it followed that the authority must be strictly pursued. If, for instance, a testator directed his feoffees to aliene within two years of his death, and they did not aliene within the two years, they could not exercise the power afterwards.[8]

From this point of view, a power to sell conferred on the executors, is clearly distinct from a devise of the land to the executors. It is true that in some of the Year Books of the fourteenth century this distinction is obscured;[9] and one of these cases, incorporated by Littleton in his text, was made the occasion of a superfine distinction by Coke.[10] But in 1431 this

[1] "Les deniers que viendront de sale les executors seront assets en leur mains, que provent que les executors vendront," Y.B. 15 Hy. VII. Trin. pl. 22 (p. 24).

[2] Y.B. 15 Hy. VII. Trin. pl. 22 (p. 11) *per* Rede, J.

[3] Co. Litt. 113a. [4] Ibid; Y.B. 15 Hy. VII. Trin. pl. 22 (p. 12).

[5] 21 Henry VIII. c. 4; the statute, Coke tells us, was extended to the case where lands were devised to the executors to be sold; he adds, "mine advice to them that make such devises by will is to make it as certain as they can; as that the sale be made by his executors, or the survivors or survivor of them, if his meaning be so, or by such or so many of them as take upon them the probate by his will or the like."

[6] Y.B. 15 Hy. VII. Trin. pl. 22. [7] Ibid. [8] Ibid.

[9] Book of Assizes 38 Ed. III. pl. 3, reproduced by Littleton § 383; Y.B. 49 Ed. III. Pasch. pl. 10.

[10] Co. Litt. 236a; he held that a devise of land to be sold by the executor amounted to a devise of the land to the executors to be sold, i.e., it gave them an estate and not

distinction between conferring a power and conferring an estate upon the executors was clearly drawn.[1]

These principles had been elucidated in connection with testamentary powers of sale conferred by testators, who resided in places where there was a custom allowing devises of lands. They acquired a vastly increased importance as the result of the statutes of Wills; for, as Coke says, "that which in Littleton's time a man might do by custom in some particular places, he may now do generally."[2] But, though these principles were elaborated as the result of their extended operation, they were in no way changed. A power conferred by a devise, valid by virtue of the statutes of Wills, operated, as Coke's words imply, in exactly the same way as a power conferred by a devise valid by virtue of a local custom. Thus, executors given a power to sell may convey the devisor's seisin by bargain and sale to a purchaser;[3] the purchaser will get the legal seisin from the devisor;[4] and upon that seisin uses may be declared, which will be executed by the statute of Uses.[5] And the power was still regarded as a personal authority. Thus, if a man gave a power to three named executors to sell, and one died, the others could not execute it.[6] No dealing with the property by the executors could deprive them of their power.[7] There was the same presumption that a power to sell, not given expressly to executors, was intended to be conferred on executors; but the presumption was qualified by the reference to the reason assigned for the presumption, and it was said to arise whenever the proceeds of the sale would be distributable by the executors.[8] The same distinction was observed between a gift of a power to sell and the gift of an estate to the executors.[9]

It is clear, therefore, that these common law powers to sell, given by will, are authorities or mandates pure and simple. But the rise of uses, and the fact that testators could empower their feoffees to convey, or could empower any third person to direct

merely a power; but this opinion is now overruled, see Sugden, Powers (8th ed.) 112-114.

[1] Y.B. 9 Hy. VI. Trin. pl. 19 (pp. 24-25) *per* Paston, J.

[2] Co. Litt. 112b; but, as Coke points out, ibid f. 111b, "these statutes take not away the custom to devise; . . . for though lands devisable by custom be holden by knight's service, yet may the owner devise the whole land by force of the custom."

[3] Co. Litt. 113a; above 153 n. 4; Sugden, Powers (8th ed.) 45, 111-115.

[4] Co. Litt. 113a; cp. Grange v. Tiving (1663) O. Bridg. at pp. 110-111.

[5] Sugden, op. cit. 196-197.

[6] Co. Litt. 112b, 113a; see below 172 for the manner in which equity modified this rule.

[7] Digges's Case (1598-1600) 1 Co. Rep. at f. 173b, 174a; Co. Litt. 265b; Grange v. Tiving (1663) O. Bridg. at p. 111; Tippet v. Eyres (1687) 5 Mod. at p. 457 *per* Ventris, J.

[8] Anon. (1574) 2 Leo. 220; Anon. (1581) Dyer 371b; Sugden, Powers 115-118.

[9] Daniel v. Upley (1625) Latch at p. 43 *per* Dodderidge, J.; Houell v. Barnes (1635) Cro. Car. 382.

their feoffees to convey, were giving an extended significance to this capacity to create powers, even before the passing of the statutes of Wills. The statute of Uses converted many of the estates, created in pursuance of these powers, into legal estates. It followed that the common law was introduced to a very much larger range of powers, all of which operated to confer the legal estate in a way very different from that in which the common law testamentary power had operated. We shall see that it is in connection with these powers that the distinction between power and property begins to be blurred; for we shall see that, in some cases, the gift of certain varieties of these powers did confer upon the donee, in a greater or a less degree, something in the nature of a proprietary right.

(2) *Powers taking effect by means of the statute of Uses.*

We have seen that, before the passing of the statute of Uses, the cestui que use could reserve to himself, or to give another, a power to revoke the old and declare new uses.[1] As and when these uses were declared, the feoffees became trustees for the new cestui que uses. Thus settlors and testators could reserve to themselves, or give to others, powers to revoke the uses already declared, and limit new uses, for the purposes of making jointures, leases, exchanges, or sales. Powers of this sort could be given after the statute; and, as a result of their exercise, and of the statute, the new uses, to which the feoffees became seised, were turned into legal estates.[2] After the passing of the statutes of Wills, testators as well as settlors could, if they liked, avail themselves of the machinery of the statute of Uses, and create by their wills powers which operated as a declaration of a use on the seisin of a person clothed with the legal estate, by the will or otherwise.[3]

During the latter part of the sixteenth and the beginning of the seventeenth centuries, the insertion of these powers in settlements and wills became increasingly common;[4] and it is in the cases decided during this period by the courts of common law, that the foundations were laid of the common law rules relating to them. That the judges were conscious that these decisions

[1] Vol. iv 439, 474-475.

[2] Sugden says, Powers (8th ed.) 17-18, that, "in the reign of Elizabeth it was insisted, that a man, having once limited the fee simple in use, could not reserve a power by a future act to defeat the uses, and to raise new ones by force of the same assurance; for as the statute extinguished the use in possession, it could no more be determined, and new estates created, without a new livery, than an estate in possession"; I have not found any case which quite bears out this statement; but, having regard to the restrictive way in which Coke and others wished to interpret the statute (above 123-124), it is not improbable that some held this view.

[3] Above 120-121.

[4] See the precedents in West, Symboleography (ed. 1615) §§ 271-277.

were opening a new chapter in the land law is clear from Coke's comment on some of the more important of them. He says:[1] "Lastly, somewhat were necessary to be spoken concerning clauses of provisoes, containing power of revocation, which, since Littleton wrote, are crept into voluntary conveyances, which pass by raising of uses, being executed by the statute 27 Hen. 8, and are become very frequent, and the inheritance of many depend thereupon. As if a man seised of lands in fee, and having issue divers sons, by deed indented, covenanteth in consideration of fatherly love, and for the advancement of his blood, or upon any other good consideration, to stand seised of three acres of land to the use of himself for life, and after to the use of Thomas his eldest son in tail; and for default of such issue, to the use of his second son in tail, with divers like remainders over; with a proviso, that it shall be lawful for the covenantor[2] at any time during his life to revoke any of the said uses, etc. This proviso, being coupled with an use, is allowed to be good, and not repugnant to the former statutes. But in case of a feoffment or other conveyance, whereby the feoffee or grantee etc. is in by the common law, such a proviso were merely repugnant and void. . . . These revocations are favourably interpreted, because many men's inheritances depend on the same."

Coke's statement makes it clear that when, by virtue of these provisos or powers, the old uses were revoked, and new ones appointed, the new uses took effect out of the seisin of the persons originally holding the legal estate to uses.[3] Thus the appointment operated to declare new uses on the seisin of the persons holding the legal estate; and, since the statute executed these uses, the appointee took a legal estate. From the fact that powers taking effect under the statute of uses operated in this manner, the following important consequences flowed:

Firstly, if the conveyance was one which did not operate by way of transmutation of possession,[4] e.g. a covenant to stand seised or a bargain and sale, no power could be given to take effect on the seisin thus conveyed to the covenantee or the bargainee, as this would in substance amount to the creation of a use on a use.[5] No doubt it was possible to revoke the old use to the covenantee or the bargainee, and to appoint to new uses on the seisin of the covenantor or bargainor. But, if this course were pursued, these powers must be exercised in a way which would have been valid,

[1] Co. Litt. 237a.

[2] Note that the power is reserved to the covenantor; for the reason why it could not be given to the covenantee see below 360.

[3] See Daniel v. Upley (1625) Latch at p. 44 *per* Crew, C.J.

[4] Above 360.

[5] Tyrrel's Case (1558) Dyer 155a; Sanders, Uses (5th ed.) ii 62.

if originally inserted in the covenant to stand seised or the bargain and sale. Thus, in the case of the covenant to stand seised, the appointee must be within the consideration of blood or marriage, so that a power to lease to strangers could not be inserted.[1] Similarly, in the case of the bargain and sale, it would be necessary that the consideration for the lease should be paid to the bargainor, in order that the lessee might get the legal estate.[2] Thus, although a power to revoke the old uses could be reserved on both these conveyances, the fact that general powers to lease or sell could not be inserted, helps to explain why these conveyances soon dropped out of general use.[3]

Secondly, as the exercise of a power to revoke old uses and to make a new appointment operates as a declaration of the uses of the original settlement, it is not in law a new alienation. The appointee takes under the original settlement. Thus, in the days when the incidents of military tenure were still existing things, no fine for alienation was payable upon such a revocation and new appointment.[4] So too it was the better opinion that, if an estate was limited to such uses as a man shall appoint, and in default of appointment to him in fee, the exercise of this power gave the appointee an estate which wholly superseded the estate limited in default of appointment, and so defeated his widow's claim to dower.[5] Similarly, a husband or wife, though they could not convey directly to one another, could exercise a power of appointment in favour of one another, because the appointment took effect, not out of their seisin, but out of the seisin of the persons seised to the uses of the settlement under which their power originated.[6]

Thirdly, estates created by the exercise of a power reserved in the settlement, because they took effect out of the seisin conveyed by the settlor, had priority to the uses declared by the settlement, and superseded them.[7] If they were not to have this effect, this

[1] Mildmay's Case (1582-1584) 1 Co. Rep. at f. 176b; Cross v. Faustenditch (1605) Cro. Jac. at p. 181; Sanders, Uses ii 100.

[2] Dillon v. Fraine (1589-1595) Popham at p. 81.

[3] Above 157; below 359-360.

[4] Viscount Montague's Case (1601) 6 Co. Rep. 27b.

[5] See Sugden, Powers (8th ed.) 479-480 for the controversy on this point; as Sugden says, "the opinion of most of the eminent men of the times, and amongst them of the late Mr. Fearne, was that the right of dower was defeated, with the estate on which it attached, by the execution of the power."

[6] "Cestui que use had devised that his wife should sell his land, and made her executrix, and died, and she took another husband, she might sell the land to her husband, for she did it *in auter droit*, and her husband should be in by the devisor," Co. Litt. 112a; Sugden, Powers 471.

[7] Whitlock's Case (1609) 8 Co. Rep. at f. 71a; Bosworth v. Farrand (1666) Carter at p. 111 *per* Bridgman, C.J.; Isherwood v. Oldknow (1815) 3 M. and S. at p. 402 *per* Le Blanc, J; Sugden, op. cit. 483-484.

must be specially stipulated in the conveyance creating them.[1] This is a logical consequence of the manner in which these powers operate; and it is essential to the efficacy of powers inserted in settlements with the object of giving the tenant in possession the extended powers needed for its proper management.

It is clear that powers of this kind are very different from a common law power given to executors or others to sell property. It is clear that persons to whom these powers were given had, sometimes to a greater, sometimes to a lesser degree, rights which were closely akin to property. This fact began to be recognized by the common law judges of the sixteenth and early seventeenth centuries. Hence they began to differentiate between powers which were merely authorities to act on behalf of another, and powers which gave to the donee something in the nature of a proprietary right. With this leading distinction between powers, which thus emerged, and with other distinctions which grew up between different varieties of these proprietary powers, I shall deal immediately.[2] But first we must glance at the rise of two other classes of powers, which have emerged subsequently to the powers which took their effect by means of the statute of Uses.

(3) *Equitable powers.*

Both the classes of powers which we have been hitherto considering gave rise to legal estates; and though, as we shall see, a large, perhaps the largest, part of the rules relating to their creation exercise suspension and extinguishment have been made by equity, many of the most fundamental rules relating to them owe their origin to the common law. Here, as in other cases, equity has interposed in the interests of children, wives, purchasers, and others to modify some of these strict common law rules.[3] Moreover, just as equity found it necessary to create new forms of equitable estates in land, through the medium of trustees, which differed in many respects from the shifting and springing uses, and executory devises, recognized by the common law;[4] just as, by the same means, it gave effect to the desires of settlors and testators to make settlements of money, stocks and shares, and other forms of permanent chattels personal, which were

[1] "In such cases when powers are to be put in execution to take effect subsequently, and to stand charged with estates made by those who claim under the limitations of the uses in the conveyance, there ought to be express words for it, and so hath been in all conveyances that I ever saw; for otherwise it is contrary to the nature of the power, which is understood to have its essence from him who created it, and in construction of law to precede the limitations of uses," Bosworth v. Forard (1666) O. Bridg. at p. 176 *per* Bridgman, C.J.

[2] Below 164-176.

[3] Powell, Powers (2nd ed.) 155-156; for some instances see below 171-173, 187-188.

[4] Above 144-149.

developing in the latter half of the seventeenth century;[1] so, as a necessary accompaniment to these developments, it recognized powers over the equitable estates thus developed.[2] These powers were modelled on the powers which operated by means of the statute of Uses; but, necessarily, they could only confer an equitable estate on the appointee; and, equally necessarily, they were wholly under the control of the court of Chancery. We shall see that that court, by its control, not only shaped the development of these equitable powers, but also added to the common law rules regulating powers which operated under the statutes of Uses and Wills, a large superstructure of equitable rules.[3]

These are the most important variety of equitable powers. In addition to these powers, other equitable powers, originating in the treatment by equity of the legal rights of a mortgagee, came to be recognized in the course of the eighteenth century. We have seen that a mortgagee, though the owner of the legal estate, and though that estate was absolute at law, held his estate subject to the mortgagor's equity of redemption.[4] Hence he was unable to sell free from that equity of redemption unless the mortgagor joined in the sale.[5] To obviate the need for the concurrence of the mortgagor, it became customary, towards the end of the eighteenth century,[6] to give to the mortgagee an express power of sale in the mortgage deed. It was quite clear by the beginning of the nineteenth century that, if the power was fair in its

[1] Vol. iv 476.

[2] Thus Sugden says, Powers 45-46, "Powers are either common law authorities; declarations or directions operating only on the conscience of the persons in whom the legal interest is vested; or declarations or directions deriving their effect from the statute of uses. . . . A power to dispose of an estate, or a sum of money, where the *legal* interest is vested in another, is a power of the second sort. The legal interest is not divested by the execution of the power, but equity will compel the person seised of it to clothe the estate with the legal right."

[3] Below 171-176, 184-190.

[4] Vol. v 330-332; vol. vi 663-665.

[5] Thus in Porter v. Hubbart (1672) 3 Ch. Rep. at p. 79 it was said, "No assignee of a mortgage should be in a better position than the mortgagee. . . . But it is otherwise if the mortgagor come into the assignment."

[6] In Bridgman's Conveyances (ed. 1690) 115 in the assignment of a term by way of mortgage to secure a debt, there is a proviso that, if the money be not paid on the day appointed, the mortgagee may sell; and in Tucker v. Wilson (1714) 1 P. Wms. at p. 262 it seems to be assumed that an express power to sell would be valid; but in the Modern Conveyancer, First Part (1706), and Second and Third Parts (1725), no power of sale is inserted in the precedents given of mortgages. The cases cited by Spence, Equitable Jurisdiction ii 633-634, are all of the end of the eighteenth century, and his language implies that the practice of giving such powers, either to the mortgagee, or to a trustee to whom the property was conveyed, was comparatively recent; he cites a passage from Cowell's Institutes as proof of the statement that this was a revival of an old practice; but this passage proves nothing as to the practice of equity, as it is only a copy of Justinian's statement that a pledgee might be given a power of sale; it is significant that we read nothing of the mortgagee's power of sale in Bacon's or Viner's Abridgements, in Powell on Powers (3rd ed.) 1789, or in Powell on Mortgages (3rd ed.) 1789; these powers are alluded to by Lord Kenyon, C.J., in The King v. Parish of Edington (1801) 1 East at pp. 293-294, in a way which indicates that they were then coming into general use.

terms and properly and fairly carried out, equity would allow the mortgagee to convey a good title to the purchaser.[1] Such a power obviously operates in a different manner to other equitable powers. The mortgagee has at law the legal estate, and can therefore convey it, if he were not prevented by the fact that, in equity his legal estate is subject to the mortgagor's equity of redemption. This power operates to release this equitable bar upon his legal rights, and thus enables him to give a title good both at law and in equity. Similarly the express power of leasing, which was sometimes given to the mortgagee, was equally necessary,[2] and operates in exactly the same way.[3]

It is clear that these equitable powers resembled many of the powers operating under the statute of Uses in that they gave to their donees rights or interests in the property over which they existed. In most cases they were something very much more than mere authorities to act on behalf of another. Hence they increased the force of the tendency, which had been operating since the passing of the statute of Uses, to give a proprietary aspect to all these powers of appointment.

(4) *The modern statutory powers.*

We have seen that as early as 1540[4] the Legislature interfered to give some protection to lessees, to whom leases had been granted by tenants in tail, or by husbands seised in the right of or jointly with their wives. The result was that such persons could, under the conditions set out in the Act, grant leases for terms which might last longer than the interest of the lessor. But, till the nineteenth century, this statute stood alone, because the various kinds of powers, which have just been described, were considered to be adequate to meet the needs, both of the general public and of the landowners. This indeed was the opinion of the Real Property Commissioners of 1829.[5] They considered that the

[1] Spence, op. cit. ii 633-634; Ashburner, Equity 314-320.

[2] Hungerford v. Clay (1722) 1 Mod. 1; it would seem that, in the earlier half of the eighteenth century, the mortgagor and mortgagee joined to make leases, see Bird, Modern Conveyancer (1729) 551; earlier, there is a case in which trustees were to hold to the use of the mortgagor for the first six months, during which time he was to have power to lease, and then to the use of the mortgagee, Bridgman 67-68; another device was for the mortgagee to redemise to the mortgagor, and to covenant that, if he entered, he would ratify leases made by the mortgagor, ibid 106-107.

[3] A power given to a mortgagor to lease operates under the statute of Uses, in the same way as a power to lease given to a tenant for life by a settlement, Williams, Real Property (22nd ed.) 567.

[4] 32 Henry VIII. c. 28; vol. iv 486-487; but it should be noted that a condition that a tenant in tail should not excercise the power given by this statute was valid, because "this power is not incident to the estate, but given to him collaterally by the Act," Co. Litt. 223b.

[5] "The existing rule respecting perpetuities has happily hit the medium between the strict entails which prevail in the northern part of the Island, and by which the property entailed is for ever abstracted from commerce, and the total prohibition of

existing system of strict settlement, modified by the rule against perpetuities, hit the happy mean between too strict a system of entail, and too strict a prohibition of settling the future devolution of property by act inter vivos or by will. But they could hardly have expressed such an opinion if this system of strict settlement had not, by means of powers of appointment, given the limited owners under these settlements added powers to lease, sell, or exchange.[1] And, whatever may have been the case in the seventeenth and eighteenth centuries, the large changes which came with the industrial revolution were making it plain, even when the Real Property Commissioners were drawing up their report, that the existing system was no longer adequate.

In the first place, too much power was left to individual landowners, who might deliberately restrict the powers of the tenant for life under the settlement. The result was that, unless the tenant was prepared to face the expense of a private Act of Parliament, he might be wholly unable to develop the property. Sir Arthur Underhill has admirably stated the practical inconveniences which ensued.[2] "If the estate consisted of a large tract of poor country, fruitful in dignity but scanty in rent, and especially if the portions of younger children charged on it were heavy, he too often found it a *damnosa hereditas;* the rents, after payment of interest on the portions, leaving a mere pittance for the unfortunate life tenant to live on, and quite disabling him from making improvements, or even keeping the property in a decent state of repair. Nay, more, if he did spend money in improvements, the money was sunk in the estate to the detriment of his younger children. He could not pull down the mansion house, however old and inconvenient it might be, nor even, strictly, make any substantial alteration in it. Unless expressly made unimpeachable for waste, he could not open new mines. But, in addition to these disabilities, what pressed still more hardly upon him, and on the development of the estate generally, was his inability to make long leases. Consequently when valuable minerals lay beneath a settled property, or the growth of a neighbouring town made it ripe for building sites (the rents for which would greatly exceed

substitutions and the excessive restriction of the power of devising established in some countries on the continent of Europe. In England families are preserved, and purchasers always find a supply of land in the market. A testamentary power is given which stimulates industry and encourages accumulation; and while capricious limitations are restrained, property is allowed to be moulded according to the circumstances and wants of every family," First Report 6-7.

[1] "Unless the owner of the estate for life was enabled to make a permanent lease, he could not enjoy to the best advantage during his own time; and they who came after, must suffer, by the land being untenanted, out of repair, and in a bad condition," Taylor v. Horde (1757) 1 Burr. at pp. 120-121 *per* Lord Mansfield, C.J.

[2] A Century of Law Reform 284-285.

the agricultural rent), nothing could lawfully be done. The tenant for life could not open the mines himself even if he had the necessary capital for working them; nor, even if unimpeachable for waste, could he grant leases of them to others for a term, which would repay the lessees for the necessary expenditure in pits and plant; nor could he grant building leases or sell for building purposes at fee farm rents."

In the second place, even if a landowner wished to insert all the powers necessary to enable the tenant for life to manage and develop his estate, he might, in the age of rapid change which came in the nineteenth century, omit to insert the right powers. He could not be expected to forsee that the growth of a neighbouring town might, fifty years hence, make part of his estate valuable building land. Nor could he forsee that the discovery of minerals might convert an agricultural estate into an industrial centre.

Legislation of the nineteenth century, which has culminated in the present Settled Land Acts,[1] and some of the clauses of the Conveyancing Acts,[2] have gone far to meet these defects. In a manner characteristic of English law reforms, they have adopted and largely extended the scheme of powers worked out by the conveyancers of the seventeenth and eighteenth centuries. From this point of view these Acts may be compared to other codifying Acts of the nineteenth century. But from another point of view they are much more than this; for they have adapted this scheme of powers to modern conditions; and they have enlarged it, by taking into consideration, not only the needs of those taking interests under settlements, but also the needs of the actual tenants of the land, and of the public at large.[3] Thus it has come about

[1] A good summary of the broad effects of this legislation will be found in A Century of Law Reform 287-294.

[2] E.g. The clauses giving powers of leasing either to mortgagor or mortgagee in possession, and a power of sale to the mortgagee, 44, 45 Victoria c. 41 §§ 18, 19.

[3] In Bruce v. Marquis of Ailesbury [1892] A.C. at pp. 364-365 Lord Macnaghten pointed out this difference between these Acts and the earlier legislation on this subject; he said: "The Act of 1882 differs from all previous legislation in regard to settled land. It proceeds on different lines, and it has a different object in view. The Settled Estates Acts did not confer or enable the court to confer on a limited owner powers beyond those ordinarily inserted in a well drawn settlement. . . . But the Settled Land Act was founded upon a broader policy and has a larger scope. A period of agricultural depression, which showed no sign of abatement, had given rise to a popular outcry against settlements. The problem was how to relieve settled land from the mischief which strict settlements undoubtedly did in some cases produce, without doing away altogether with the power of bringing land into settlement. That was something very different from the task to which Parliament addressed itself in framing the Settled Estates Acts. In these Acts the Legislature did not look beyond the interests of the persons entitled under the settlement. In the Settled Land Act the paramount object of the Legislature was the well-being of settled land. The interests of the persons entitled under the settlement are protected by the Act as far as it was possible to protect them. . . . But it is evident I think that the Legislature did not intend that the main purpose of the Act should be frustrated by too nice a regard for those interests."

that these modern statutory powers, starting from the basis of the common law powers, the powers operating under the statute of Uses, and the equitable powers of the older law, have to a large extent superseded them.

We must now turn again to the sixteenth and seventeenth centuries, and examine the beginnings of the development of the law as to the various classes of powers which had been rendered possible by the statutes of Uses and Wills. As I have already pointed out, and as we shall now see, one of the earliest results of that development was the growth of a distinction between powers which merely gave an authority to convey an estate or to do some other act, and powers which gave also something of the nature of a proprietary interest to their recipients. The history of this, the most important distinction between powers, and of other classifications which emerged as the law developed, is the subject of the ensuing section.

Classifications of Powers

The distinction between powers which are merely authorities or mandates, and powers which give the donee something in the nature of an interest in the property over which they have been created, is at the root of the many distinctions which have been drawn between different kinds of powers. Some powers approach more closely to the conception of mandate, and others to the conception of property. Consequently, these different kinds of powers have, as the law has developed, been invested, sometimes with the characteristics of mere authorities or mandates, and sometimes with the characteristics of proprietary interests. We have seen that, as early as 1663, the courts had recognized that some varieties of powers were developing into a wholly new species of proprietary interests;[1] and, from that time to the present day, the courts of law and equity, with some assistance from the Legislature, have been elaborating the nature and incidents of this new interest. In this section I propose to show how the working out of the distinction between a power which was a mere authority or mandate, and a power which conferred something in the nature of a proprietary interest, gave rise to the principal classifications of powers known to modern law. In the following section I propose to illustrate the manner in which the courts, with some assistance from the Legislature, have determined the nature of this new species of proprietary interest, by reference, sometimes to the conception of an authority or mandate, and sometimes to the conception of a proprietary interest.

[1] Above 152.

The three classifications of powers, the history of which I propose to sketch are, (1) the division between powers simply collateral and powers which are not simply collateral; (2) the division between general and special powers; and (3) the division between ordinary powers and powers in the nature of a trust.

(1) *The division between powers simply collateral and powers which are not simply collateral.*

The form which this division has taken in modern law has been clearly and authoritatively stated by Jessel, M.R.,[1] as follows: "The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with a power of appointment after his death. Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished, or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant." These distinctions were only gradually arrived at in the course of the sixteenth and seventeenth centuries. As we shall now see, the first distinction to emerge was the distinction between powers simply collateral and other powers. Then, as between these other powers, the distinction between powers in gross and powers appendant gradually grew up.

We can see the germ of the distinction between a power simply collateral, and a power which is not simply collateral because it is annexed to the land, as early as the year 1500. We have seen that it was settled, in a case discussed in that year, that a power simply collateral, such as a power given to executors or feoffees to uses to sell, was not lost in consequence of any dealing by the executors or feoffees with the property.[2] But it was also laid down by Fineux, C.J., that there was "a diversity where the power given to the feoffees is annexed to the land, and where it is not so annexed; for if the will direct that the feoffees shall make an estate over to such a one for certain years; now, if they make a feoffment to another to the same use, the first feoffees cannot do this (i.e. execute their power), for this power is a thing annexed to the land, which no one can execute but he who has the land."[3]

[1] Re D'Angibau (1880) 15 C.D. at pp. 232-233. [2] Above 154.

[3] "Et est diversite ou le pouvoir donne al feoffees est annexe al terre, et ou nemy: car si le volonte soit que les avant dits feoffees feront estate oulture a un tiel

This diversity came prominently before the courts of common law as the result of the statute of Uses. Persons who covenanted to stand seised to uses, or who bargained and sold land to others, frequently reserved a power to revoke these uses, and to appoint to new uses. Clearly these powers were annexed to the estate in the land, which such covenantors or bargainors would resume, as the result of the revocation of these uses. The revocation of the uses would give them the land again, just as if they had re-entered for the breach of a condition, so that such a power could be regarded as annexed to the land. Being, therefore, interests somewhat similar to future estates in the land, they could be barred or released or destroyed like other future estates; and, as we shall see,[1] they gradually acquired, to a greater or a lesser extent, other characteristics of an estate. This distinction between powers, based on these grounds, was clearly drawn in *Albany's Case* in 1586.[2] It was said in that case, that, "although this power to revoke the former uses and estates, and to limit a new use, is not properly any interest or right in the land, yet it is a means by which the possession and right of the land shall be altered and devested out of a third person."[3] It resembled, therefore, if not an estate in the land, a condition by the happening of which an estate might arise, and the benefit of which might, like an estate, descend to the heir or be barred or released. Therefore, unlike a merely collateral power, it could be destroyed by fine or feoffment,[4] or released.[5] Some years later, in *Digges's Case*,[6] Popham, C.J., following the same line of reasoning, drew the same distinction between a power simply collateral and other powers. Dealing with a power of revocation and new appointment reserved to a person who had covenanted to stand seised, he said:[7] "his power is not merely collateral but savours and tastes of the estate and interest in the land, *quod fuit concessum per totam Curiam.* But . . . if a feoffment in fee be made by A to divers uses, with proviso that, if B shall revoke, the uses

pur certeins ans; or s'ils font feoffment oultre a meme le use, les premiers feoffees ne peuvent faire ce, car cest pouvoir est chose annexe al terre que nul poet faire forsque cestuy que ad la terre," Y.B. 15 Hy. VII. Trin. pl. 22 (p. 12).

[1] Below 177-184.

[2] 1 Co. Rep. 107a.

[3] At f. 112a.

[4] At f. 112b.

[5] "And as to the second point he (Wray, C.J.) conceived that the said future power might be released, for it may be resembled to a condition subsequent, although the performance or breach thereof cannot be done without an act precedent; as if A enfeoff B and his heirs upon condition, that if B survive C, if then A or his heirs pay to B his heirs or assigns 40s., that then he and his heirs shall re-enter; in that case, it is a condition subsequent, and although it cannot be performed but upon a contingency, yet is the inheritance in him, and shall descend to his heir, and therefore may be released, and his heir by his release may be barred," ibid at f. 112b; and see also ibid 113a.

[6] (1598-1600) 1 Co. Rep. 173a.

[7] At f. 174a.

shall cease, there B cannot release this power; and a fine levied or a feoffment by him, shall not extinguish it, for the power of B is merely collateral, and the land doth not move from him, nor shall the party be in by him nor under him; but a fine feoffment or release by A, if the power had been reserved to him, would extinguish it *causa qua supra*."

This reasoning applied not only to powers of revocation and new appointment reserved to a covenantor, but also to a power given to a feoffee to make leases or other dispositions, which altered or devested the estate.[1] In these cases the feoffee gained something by the exercise of the power; and, because he thus stood to gain, the power was not simply collateral.[2]

Thus, by the end of the sixteenth century, the distinction between simply collateral powers, and powers entrusted to persons who either had some interest in the land over which the power extended, or who would gain an interest in the land by the exercise of the power of revocation, was well ascertained. But it would seem that the further distinction between powers appendant and powers in gross did not arise till the latter half of the seventeenth century. Thus, in 1665, in the case of *Edwards v. Sleater*, Rainsford, B., thought that a power to lease for thirty-one years, given to a tenant for life to be exercised after his death, was a power simply collateral, because it was not attached to the estate of the tenant for life.[3] But Turner, B., and Hale, C.B., held that, notwithstanding this fact, such a power "savoured of the land," and so was not simply collateral.[4] In fact, it was in elucidating the nature of such a power, that Hale, for the first time, drew the modern distinction between the two kinds of powers which are not simply collateral. These powers are, he said, "of two sorts. First appendant and annexed to the estate; secondly in gross."[5] An instance of the first is a case where a tenant for life has a power to lease for twenty-one years. The second arises "where

[1] Berry v. White (1661) O. Bridg. at p. 91; Grange v. Tiving (1663) O. Bridg. at p. 111; Edwards v. Sleater (1665) Hardres 410.

[2] "These powers (powers to lease) have such a dependency on the estate, they are not reckoned as bare authorities," Berry v. White (1661) O. Bridg. at p. 91.

[3] "The sole question here is whether this lease for 31 years be well made or not. . . . And here are two things to be considered. First, the bargain and sale and the consequences thereof. Secondly, the reconveyance by feoffment, and the consequence of that. As for the bargain and sale, that does not displace any remainders limited to other persons. So that, notwithstanding it, the power remains, and nothing is passed away by it, but what the tenant for life might lawfully pass. Secondly, the reconveyance by feoffment, that indeed divests all the remainders, and makes the feoffee to be in of a new estate. . . . And it may be doubted whether or no the power be not thereby superseded till the estates be recontinued by an entry? But I hold it is not: first, it is collateral to the estate of the tenant for life, not being to commence till after his estate be determined: and therefore it cannot be destroyed by a feoffment," Hardres at p. 414.

[4] Ibid at p. 415 *per* Turner, B.

[5] Ibid.

the power does not fall within the estate, as here the tenant for life has a power to make an estate, which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in gross; because the estate for life has no concern in it."[1] Such a power differed from a power simply collateral, both because its exercise affected the land in which the donee of the power had an interest, and because that exercise, though not affecting the estate of the donee, might in many ways be beneficial to him. It came rather within Coke's definition of a power which was not simply collateral.[2] Therefore, although its existence could not be affected by any dealings with the particular estate, because it was not annexed to that estate,[3] it might, like a power appendant and unlike a power simply collateral, "be destroyed by release or by a fine or a feoffment, which carry away and include all things relating to the land."[4]

This division between powers was forced on the common law courts, chiefly by the need to distinguish between powers which were so much like future estates in the land that they could be destroyed by the acts of those to whom they were given, and powers which were mere mandates and therefore not destructible. We shall see, too, that the claims of the crown to the property of its debtors, and to forfeitures for treason and felony, were also exercising an influence in the same direction.[5] But, as we shall now see, this division did not comprehend all the diversities which were emerging between these powers of a proprietary kind, in consequence of the increasing use which the conveyancers were making of them.

(2) *The division between general and special powers.*

As early as the sixteenth century, it was becoming apparent that the gift of a power which conferred upon the donee authority

[1] Hardres at p. 416.

[2] "There is a diversity between such powers and authorities as are only to the use of a stranger, and nothing for the benefit of him that made the release . . . and a power or authority which respecteth the benefit of the releasor, as in these usual powers of revocation, when the feoffor etc. has a power to alter change determine or revoke the uses (being intended for his benefit), he may release," Co. Litt. 265b.

[3] "An assignment of totum statum suum, or other alteration of the estate for life, does not affect such a power; because it is a power in gross," Hardres at p. 416; but it was otherwise in the case of a power appendant, Berry v. White (1661) O. Bridg. at p. 91.

[4] Hardres at p. 416; so, in King v. Melling (1672) 1 Ventr. at p. 228, Hale said, "the recovery does not only bar the estate, but all the powers annexed to it: . . . so fines and feoffments do ransack the whole estate, and pass, or extinguish etc. all rights, conditions, powers etc. belonging to the land, as well as the land itself"; see also Bird v. Christopher (1653) Style 389; this seems to be admitted in Tomlinson v. Dighton (1712) 1 P. Wms. at p. 168, and see Sugden's comment, Powers (8th ed.) 907; for the later cases on this point see Sugden, op. cit. 88-90.

[5] Below 177-178.

to appoint to any one he pleased, was very difficult to distinguish from the gift of a proprietary right. This difficulty was especially prominent in devises, because, in construing the limitations in a will, the courts did not look so narrowly at the words used, but tried to give effect to the underlying intention of the testator. The nature of the difficulty is illustrated by two cases of the years 1578 and 1587. In the first of these cases,[1] a testator, seised of land in fee, devised it to his wife for life, and gave her power, after her death, to devise to whom she pleased. It was held that she only had an estate for life, with a general power of appointment over the fee. In the second of these cases,[2] a testator devised land to his wife for life on condition that she should not marry. If she died or married, the land was to remain to A in tail. If A died without issue in the life of the wife, the land was to remain to the wife to dispose of as she pleased. A died without issue in the life of the wife. It was held that the wife took an estate in fee simple.

Obviously the courts were puzzled by these devises which, while giving a disposing power equal or almost equal to the disposing power of a tenant in fee, yet stopped short of giving the fee. The best illustration of their doubts as to how these powers should be treated, is perhaps the diversity of opinion shown in interpreting the devise in *Daniel v. Ubley*.[3] In that case a testator, seised in fee, devised a house to his wife, "to dispose at her will and pleasure and to give it to any of my sons which she pleases." According to one view she took a life estate with a power to appoint the fee simple among the sons.[4] According to another view she took a fee simple on trust to appoint amongst the sons.[5] According to a third view she took a fee subject to the condition that she appointed among the sons; and, if she did not, the heir might enter as for the breach of a common law condition.[6] In this view we see another illustration of the way in which the judges used the analogy of the common law condition to aid them in their construction of this new branch of the law;[7] and we shall see that this analogy will again make its appearance in cases which turn on the capacity of donees of a power to execute it.[8]

These difficulties, felt by the judges of the sixteenth and seventeenth centuries, were to some extent solved, partly by the growth of rules distinguishing the circumstances under which a

[1] Anon. 3 Leo. 71. [2] Jennor and Hardie's Case 1 Leo. 283.
[3] (1625) W. Jones 137; S. C. Latch 9, 39, 134; Noy 80.
[4] W. Jones 137-138 *per* Crew, C.J., and Jones, J.
[5] Ibid *per* Whitelocke and Dodderidge, JJ.
[6] Latch at p. 41 *per* Dodderidge, J.; see Sugden, Powers (8th ed.) 105 for an account of the different opinions there expressed.
[7] Above 166. [8] Below 181 n. 2.

devise would pass the property, from those under which it would create only a power;[1] and partly by the growth of the modern distinction between special and general powers. It was decided in 1674 and 1712 that, if a power to appoint the fee among certain specified persons was given to a devisee for life, such devisee would take a life estate with a special power superadded.[2] But a special power of this kind was obviously very different from a power to appoint to anyone, including the donee himself. It was more akin to a mandate by the donor of the power, and less akin to a proprietary interest in the donee; for it might well be that the donee had no pecuniary interest at all in the property to be appointed. On the other hand, if a donee could appoint to anyone, including himself, he had in substance a right of property. But the distinction does not seem to have been very clearly grasped in the seventeenth century. Thus, in 1671, Hale, C.J., called a general power of revocation and new appointment a "personal power," "a manacled power," and a "kind of trust that he may revoke."[3] We shall see however that, in the course of the eighteenth century, the interests of creditors,[4] the application of the modern rule against perpetuities,[5] and the need to settle the question whether and to what extent the donee of a power can delegate the exercise of the power,[6] have emphasized the proprietary characteristics of general powers; and have distinguished them from those special powers, which are always more or less mandatory in their nature. We shall see too that the treatment by equity of all these powers, and more especially of special powers, has tended to bring out and to elaborate these and other practical differences between these two classes of powers.[7] Thus, just as it was the need to determine the extent to which a power could be released or destroyed, which was the chief cause for the elaboration of the differences between powers simply collateral and other powers; so it was the need to distinguish more clearly between the rights and duties of those invested with powers which were essentially proprietary, and the rights and duties of those invested with powers which were

[1] Sugden, Powers 104, thus states the main principle: "A devise to A for life, expressly, with remainder to such persons as he shall by deed or will or otherwise appoint, will of course not give him the absolute interest, although he may acquire it by the exercise of his power. . . . A devise of property *to the discretion* of A passes the fee, and does not merely confer a power: so a devise *at the disposition* of A carries the fee. It is equivalent to a devise to A to *give and sell at his pleasure*. There is no difference between a devise that A shall do with the land at his discretion, and a devise of the land to A to do with it at his discretion."

[2] Liefe v. Saltingstone 1 Mod. 189; Thomlinson v. Dighton 2 Salk. at p. 240; Sugden, Powers (8th ed.) 106.

[3] Smith v. Wheeler 1 Ventr. at p. 131.

[4] Below 172.

[5] Below 189.

[6] Below 182 183.

[7] Below 173.

essentially mandatory, which was the chief cause for the elaboration of the differences between general and special powers.

But it soon became apparent that some of these special powers—powers for instance given to a husband to appoint amongst the children of the marriage—approach the confines of trusts. The need to distinguish between power and trust, and to regulate powers which had about them something of the character of trusts, has led to the third and latest division between powers.

(3) *The division between ordinary powers and powers in the nature of a trust.*

In principle the distinction between powers and trusts is clear. "Powers are never imperative: they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted."[1] The distinction is of course obvious in the case of general powers. But, in the case of special powers, it is a good deal less obvious; and, in the case of powers simply collateral, the large control exercised by the court of Chancery, and the new conception that the trust bound the property rather than the person trusted,[2] tended to make the difference between powers and trusts very fine. Indeed, as far back as the sixteenth century, the intimate relations between the two were apparent. Coke, in one passage, calls the power given to executors to sell a "bare trust,"[3] and, in another, "a trust or an authority";[4] and in 1581 the court seemed to think that executors, who had such a power, were "entrusted" by the testator.[5] Naturally, when equity began to regard the trust as attached to the property, it began to exercise an active control over powers which seemed to it to have a fiduciary character. And so, just as the growth of powers of appointment, and their development by the courts of common law after the passing of the statute of Uses, tended to give to these powers some of the characteristics of legal estates in the land; so, the regard paid by equity to the interest of the persons for whose benefit powers of a fiduciary character were created, tended to give powers of this kind some of the characteristics of equitable interests.

We can see clear signs of the beginning of this process in the latter half of the seventeenth century. We have seen that, at common law, it was held that a power simply collateral, such as a power given to executors to sell, could be exercised only by

[1] Attorney-General v. Lady Downing (1767) Wilm. at p. 23 *per* Wilmot, C.J.
[2] Above 145-147.
[3] Co. Litt. 113a.
[4] Ibid 181b.
[5] Anon. Dyer 371b.

the executors named; and that, if one died, the survivors could not execute it.[1] But, as early as 1637,[2] the court of Chancery seemed to have applied to directions of this kind in a will the rule that a trust shall not fail for want of a trustee, and, in a case where there was no direction who should sell the property, directed the heirs to sell; and this method of dealing with such a situation was upheld by the House of Lords in 1670.[3] In the latter half of the century there are many instances in which such powers were treated as being in substance trusts, and enforced as such. Thus in 1655, in a case where the executors had been directed to sell the land to pay debts, and they had not sold, a bill by the creditors, asking that the heirs should be directed to sell, was successful.[4] In 1661, a direction that lands should be sold for the payment of debts and legacies, was enforced against the surviving trustees and the heir, "because the lands were tied with a trust which will survive in equity";[5] and in 1663 a demurrer on the ground that such a power was, "but an authority in the executor which is dead with him," was over-ruled.[6]

This jurisdiction, thus assumed by the court of Chancery, tended to render obsolete the analogy drawn by the common law judges between powers and common law conditions. In fact the rules applicable to these common law conditions rendered this analogy peculiarly inappropriate. It was only the heir who could take advantage of the breach of such a condition;[7] and, therefore, if the condition was attached to his estate, and he was guilty of its breach, there was no one who would wish to take advantage of the breach. For this and other reasons the superior flexibility of the modern trust has gone far to render obsolete much of that learning of common law conditions, which, in the seventeenth century, the courts of law applied to elucidate and to give effect to the wishes of testators.[8] This process was beginning in the latter part of the seventeenth century. In some of the cases then decided these conditions were treated as trusts; and this construction necessarily reacted upon the manner in which powers given by testators to their devisees to dispose of the property devised were interpreted. Thus, in cases of the type of *Daniel v. Ubley*,[9] the difficulties, which the court then felt, can be solved by treating the devisee's estate as an estate for life, with a power

[1] Above 155.

[2] Locton v. Locton (1637) 2 Free. 136; in Pitt v. Pelham, ibid 135, an earlier case of Hyer v. Wordale decided in 1606-1607 was cited; apparently it went partly on the ground of fraudulent dealing by the executrix; and probably the jurisdiction was originally based, partly at any rate, on this ground.

[3] Pitt v. Pelham 2 Free. at p. 135.

[4] Amby v. Gower 1 Ch. Rep. 168.

[5] Gwilliams v. Rowel Hardres 204.

[6] Garfoot v. Garfoot 1 Ch. Cas. 35.

[7] Vol. ii 594 n. 5; vol. iv 416.

[8] Sugden, Powers (8th ed.) 106.

[9] Above 169.

to dispose, which power the court can, in a proper case, treat as a power in the nature of a trust.

In the seventeenth century, this idea that a power might be a power in the nature of a trust, was applied chiefly to powers simply collateral; and notions derived from the conception of a trust were sometimes loosely applied to the execution of powers —even to general powers of appointment.[1] In the eighteenth century, the equitable rules upon this question gradually became more precise. These rules were applied by the court to special powers of appointment, in cases where it thought that the creator of the power had intended to put upon the donee of the power a duty to execute it. This extension was natural, and, indeed, inevitable. We shall see that, in the course of the seventeenth and eighteenth centuries, equity had assumed jurisdiction to relieve in certain cases against defective execution of powers;[2] and to interfere in cases where there had been a fraudulent exercise of a power.[3] This jurisdiction was based upon the principle that equity ought to give effect, if possible, to the intentions of the creators and donees of powers; and that it ought to protect the interests of the persons intended to be benefited by their exercise; more especially when those persons were children or relatives for whom the creator of the power had a moral duty to provide. This principle was applied in the leading case of *Harding v. Glyn* in 1739;[4] and the rule, ultimately established by the eighteenth century decisions, was thus stated by Lord Eldon in *Brown v. Higgs*[5]: "If the power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it." It is clear that this principle, when applicable, will render obsolete the common law rules which put it into the power of the donee to release or otherwise destroy his power; just as the same trust concept has rendered obsolete much of the learning as to common law conditions, by the help of which the common law tried to give effect to the wishes of testators.

The principle stated by Lord Eldon is easier to state than to apply. The difficulty is, in fact, closely akin to that of determining

[1] Smith v. Wheeler (1671) 1 Ventr. at p. 131; above 170.
[2] Below 187-188.
[3] Below 188.
[4] 1 Atk. 469.
[5] (1803) 8 Ves. at p. 574.

when precatory words will, and when they will not, amount to a trust. And, in both these classes of cases, this difficulty was increased by the too rigid application of the doctrine of binding force of decided cases to questions which do not properly fall within it, because they are purely questions of the meaning intended by the framer of the document before the court. The result was that, in these cases, attention was paid rather to the elaboration of minute rules and fine distinctions, which, it was supposed, could be deduced from earlier cases in which similar instruments had been construed, than to the ascertainment of the intention of the framer of the actual instrument which was before the court; and, naturally in the elaboration of these rules and distinctions, the intentions of the framers of these instruments tended to be disregarded, and the force of established principles tended to be weakened or obscured.[1] Thus, in the eighteenth and early nineteenth centuries, the trust concept was unduly extended; and courts of equity, disregarding the wise advice of Holt, C.J.,[2] went great lengths in depriving donees of powers of the discretion which ought to have belonged to them. There were cases in which, as Sugden says, "The trustee's discretion was not only taken away, but the Court itself executed the power."[3]

This tendency to take away from the donees of powers the discretion which had been conferred upon them, resulted in the growth of the unfortunate distinction between exclusive and non-exclusive powers, and the accompanying doctrine of illusory appointments. As early as 1682, the court of Chancery, disregarding the opinions of Pemberton, afterwards chief justice of the King's Bench, and earlier decisions in Chancery to the contrary, had laid it down that, if property were left to a wife, accompanied by a trust to dispose of it for the benefit of her children, and if the wife gave only 5/- to one child, the appointment must be set aside, and the estate divided equally.[4] It was held, in other words, that the power was a non-exclusive power. It is true that it was recognized that a testator might in terms give a power to exclude some one or more of the objects of the power;[5] but the leaning of the court was always in favour of the view that a power was non-exclusive, unless a clear intention

[1] See below 393-395 for other instances of the undue extension of the sphere of rules of construction.

[2] "I must confess, courts of equity would have enough to do, if they were to examine into the wisdom and prudence of men in disposing of their estates, and if they were not discreetly but foolishly done; therefore to set them aside, there would need more courts of Chancery than there are, to dispatch the business of equity in this point," Bath and Mountague's Case (1693) 3 Ch. Cas. at p. 107.

[3] Powers (8th ed.) 601.

[4] Gibson v. Kinven (1682) 1 Vern. 66.

[5] Thomas v. Thomas (1705) 2 Vern. 513.

to the contrary appeared.[1] As the case of *Gibson v. Kinven* shows,[2] the doctrine of illusory appointments was a necessary corollary to this way of construing these special powers. But this doctrine was found to be so unsatisfactory, and productive of so much litigation,[3] that it was abolished by statute in 1830.[4] This statute, however, did not abolish the root of the evil—the distinction between exclusive and non-exclusive powers—but only a particular consequence of it. The result of this half-hearted piece of legislation, as Jessel, M.R., pointed out in 1874,[5] was "that when the power is non-exclusive, if the appointor forgets to appoint a shilling or even a farthing, to every object of the power, the appointment is bad, because someone is left out." As he said, "The reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get." This reasonable course was adopted by the Legislature in the following year, and a free discretion to appoint amongst the objects of the power, unless such free discretion was expressly excluded, was restored to the donees of powers.[6]

The change effected by this statute was, in principle, the same as a change which was taking place, about the same time, in the attitude of the court towards trusts implied from precatory words—a change of attitude which, as we shall see,[7] was due to a better understanding of the proper sphere of rules of construction. As the result of this change, the courts were beginning to refuse to construe a trust from merely precatory words, unless, on the construction of the document before it, it could see that a trust was really intended.[8] It is clear that this change in the attitude of the court affects the question whether, in any given case, a power will be held to be a power simply, or a power in the nature of a trust, for these powers are often conferred by precatory words.[9]

Just as equity had placed a supplementary set of equitable interests side by side with those legal executory interests, which had come into the land law as a result of the statutes of Uses and Wills;[10] so, by its superintendence over these powers, and by its application to some of them of principles applicable to trusts, it

[1] Sugden, Powers (8th ed.) 444-445.
[2] (1682) 1 Vern. 66.
[3] For its detailed history see Sugden, op. cit. 938-942.
[4] 11 George IV. and 1 William IV. c. 46 § 1.
[5] Gainsford v. Dunn L.R. 17 Eq. at p. 407.
[6] 37, 38 Victoria c. 37.
[7] Below 395.
[8] Lambe v. Eames (1871) 6 Ch. App. 597; re Adams and the Kensington Vestry (1884) 27 C.D. at pp. 409-410 *per* Cotton, L.J.
[9] See e.g. Combe v. Combe (1925) 1 Ch. 210.
[10] Above 144-149.

had placed, side by side with the common law rules relating to powers, a large supplementary structure of equitable rules. Since these rules proceeded on the principle that the intention of the creator or the donee of the power must if possible be carried out, they tended to strengthen the hold of the appointees on the property which was the subject of the power. They therefore tended to strengthen that connection of power with property which had been created by the legislation of the sixteenth century. We must now examine the manner in which, as the result of these developments, the mixture of the proprietary and the mandatory aspects of powers had created a new kind of interest in, and a new machinery for dealing with property, and the effect of this new interest and this new machinery upon the land law.

The Proprietary and the Mandatory Aspects of Powers

The rules which have fixed the character of the various classes of powers, and prescribed the conditions of their creation exercise suspension or revocation, were developed, partly by the common law, partly by equity, and partly, in the nineteenth century, by the Legislature. The common law courts have laid down a number of rules and principles, which govern many of those powers which, in the sixteenth century, had been brought under their jurisdiction by the operation of the statutes of Uses and Wills; and, as the result of this development, most of these powers, though still retaining many of the characteristics of an authority or mandate, were also acquiring many of the characteristics of a proprietary interest. On this foundation of legal rules and principles the court of Chancery, in the latter part of the seventeenth and in the eighteenth centuries, erected a superstructure of equitable rules, the main tendency of which was to develop the proprietary characteristics of these powers. In the nineteenth century certain changes were made by the Legislature. These changes tended mainly in the same direction; but partly also in the opposite direction, in that they restored to the donees of powers some of that discretionary authority, which had been unduly interfered with by some of the doctrines of the court of Chancery. In considering, therefore, the development of the law as to the proprietary and the mandatory aspects of powers, I shall consider, firstly, the rules laid down by the common law courts, secondly, the additions made by the court of Chancery, and thirdly, the principal changes made by the Legislature. In conclusion, I shall endeavour to indicate the outstanding peculiarity of these powers of appointment, and to summarize the effect which the growth of the law, described in this and in the preceding sections, has had upon the development of the land law.

(1) *The rules laid down by the common law courts.*

Two main causes led the common law courts to develop the proprietary aspect of powers of appointment—firstly, the desire to make such rules for the creation of all future interests in property that it would be impossible to create a perpetuity through their instrumentality; and secondly, the interests of the crown.

(i) It is quite clear from *Albany's Case*[1] and from *Digges's Case*[2] that the courts were ready to make it easy for the donees of powers relating to land, whether appendant or in gross, to get rid of them. In the former case, the judges held that a power relating to land could either be regarded as a right collateral to the right in the land, and for that reason destructible by fine or feoffment;[3] or as a condition or covenant which could be released;[4] or as an executory proviso or covenant which could be got rid of by a defeasance under seal, on the ground that, as it was created by deed, so it could be got rid of by deed.[5] In the latter case, as we have seen,[6] the law was laid down in substantially similar terms; and this liability to destruction was made the leading difference between these powers relating to the land and powers simply collateral. The law thus laid down was applied by the common law courts during the seventeenth century. We have seen that Hale laid it down that, though a dealing by a tenant for life with his life estate would not destroy a power in gross, fines feoffments and recoveries "do ransack the whole estate," and destroy all powers relating to the land.[7] Although, as we shall see,[8] these common law principles were modified by the way in which equity treated certain classes of powers; and although they were necessarily modified by the abolition of fines and recoveries,[9] and the abolition of the tortious operation of a feoffment;[10] the liability of most powers to be destroyed by the release of the donee has not been taken away, and has even been extended by the Legislature.[11]

(ii) The rights of the crown to the lands of traitors and to the property of its debtors, were powerful incentives to the development of the proprietary aspect of powers. If these powers could be regarded as property, they might be made liable to escheat or forfeiture, or be taken to satisfy debts. If, on the other hand, they were mere personal mandates or authorities, they disappeared on the death of the donee, and could not be

[1] (1586) 1 Co. Rep. 110b.
[2] (1598-1600) 1 Co. Rep. 173a.
[3] 1 Co. Rep. at ff. 112a, 112b.
[4] Ibid at f. 112b.
[5] Ibid at f. 113a.
[6] Above 166-167.
[7] King v. Melling (1672) 1 Vent. at p. 228; above 168 n. 4.
[8] Below 184 seqq.
[9] Above 114.
[10] Above 114.
[11] Below 190.

regarded as property which could be taken to satisfy the donee's debts.

We have seen that a statute of 1541-1542 [1] had enacted that a conviction for treason should entail the forfeiture, "as well of uses, rights, entries, conditions, as possessions, remainders, reversions, and all other things." We have seen, too, that the courts were prepared to adopt the analogy of the condition in order to elucidate the legal incidents of some of these powers.[2] The fact that it was to the interest of the crown that this analogy should be pressed in cases where traitors were donees of these powers, naturally had considerable weight with the judges in the sixteenth and seventeenth centuries. Thus in 1575 [3] it was held that, when a grant of all a man's goods and chattels was revocable on a tender by him of 5s., and he was convicted of treason, the benefit of this condition or power of revocation was forfeited to the crown. In 1590, in *Englefield's Case*,[4] it appeared that Sir Francis Englefield had settled property on his nephew. In this settlement, after a recital that it was uncertain how his nephew's character might develop, he provided that, if he or any other by his authority tendered his nephew a ring to intent to make void the uses, the uses should be void. Afterwards Sir Francis was convicted of treason; and the question arose whether this entailed the forfeiture of this condition or power. After exhaustive arguments, it was ultimately held that the benefit of that power or condition was forfeited; and as, on the advice of Coke and other counsel for the defendant, preparations were being made for an appeal to the House of Lords, the decision was confirmed by Act of Parliament. On the same principle it was held in *Robert Dudlie's Case* in 1610 [5] that, when a forfeiture was incurred for a contempt in not returning to England in obedience to a writ issued under the Privy Seal, such forfeiture would include a power of revocation, so that lands subsequently aliened under the power could be seized. This case was cited in *Sir Edward Coke's Case* [6] in 1624, where it was held that lands of the king's debtor subject to a power of revocation could also be seized—"The treasure of the king," it was said, "is the strength of the king, and the strength of the king is Majestas Imperii, tutela legum et libertatis." [7]

It is clear, then, from these cases, that the interests of the crown were leading the courts in the same direction as the desire

[1] 33 Henry VIII. c. 20; vol. iv 500. [2] Above 166.
[3] Dacre's Case cited in Sir Francis Englefield's Case 4 Leo. at p. 169.
[4] 4 Leo. 135, 169; S.C. 7 Co. Rep. 11b; for a good account of the case see Sugden, Powers (8th ed.) 183-184.
[5] Cited 2 Rolle Rep. at p. 304. [6] 2 Rolle Rep. 294.
[7] *Per* Dodderidge, J., ibid at p. 298.

of those courts to make the creation of a perpetuity impossible. Both sets of considerations led them to invest these powers with certain of the incidents of estates in the land. But even these cases showed that complete assimilation was not possible. Some of the reasoning in *Albany's Case* proceeded on the assumption that they were merely executory provisos or covenants which could be got rid of by defeasance under seal.[1] But a covenant was a personal obligation; and it was clear that there was an element of personal obligation about some of these powers, which made their alienation or forfeiture impossible. This was clear enough in the case of powers simply collateral; and in some of the cases, which turned on the rights of the crown to forfeiture, it was becoming evident that the same principle applied to some of these powers, even though they were powers relating to land. Some of them were clearly of so personal and so mandatory a character that they could not be regarded as wholly proprietary.

It had been held in a case arising out of the attainder of the Duke of Norfolk in 1571, that a power of revocation, to be signified under the Duke's hand and seal, was "personal and inseparably annexed to his person . . . which none could do but the duke himself."[2] Similarly, in *Warner v. Hardwin*,[3] a proviso by a settlor that the settlement should be avoided if he tendered to the feoffees their heirs or assigns or to any of them a gold ring or a pair of gloves or the sum of twelve pence, at the same time declaring that the tender was made with intent to make void the feoffment, was personal to the settlor, and was not forfeited to the crown on the conviction of the settlor for treason. Having regard to these cases, it is not surprising that the counsel, who argued unsuccessfully for the defendant in *Englefield's Case*, contemplated bringing a writ of error; and that the advisers of the crown thought it necessary to confirm the decision by an Act of Parliament. In fact, in 1671, in the case of *Smith v. Wheeler*,[4] the reasoning in the *Duke of Norfolk's Case* and in *Warner v. Hardwin* was followed; and it was laid down that a power of revocation, which was a merely personal power, could no more be forfeited than a power simply collateral.[5] This has ever since

[1] 1 Co. Rep. at f. 113a; above 177.

[2] Cited in Englefield's Case (1592) 7 Co. Rep. at f. 13a.

[3] (1624) Palmer 429; S.C. 2 Rolle Rep. 393 *sub nomine* Warner v. Hargrave; W. Jones 134; Latch 25, 69, 102; Palmer's report is the report of the case in the King's Bench; it had been decided against the crown in the Exchequer—the attorney-general having confessed that he had no case, and also in the Common Pleas; the date of the attainder of Sir W. Shelley, which was in issue in this case, was 1586, so that the decision in the Exchequer may well have been prior to Englefield's Case, see Sugden, Powers 183-184.

[4] 1 Ventr. 128; see Hale, P.C. i 246-247.

[5] "It creates a personal power of fetching back the former, and declaring new trusts, observing the circumstances; upon the same reason that this estate can be

been held to be the law; so that it is only if the act to be done to execute the power "is a mere ministerial or formal act, not inseparably annexed to the person or mind of the donee, but which may be performed by one person as well as another, that the power will go to the crown."[1]

It is clear therefore that, even where the interests of the crown were concerned, the personal character of some of these powers could not be disregarded by the courts. But powers of this personal character were very often distinctly mandatory in character. They were often quite as much authorities given by a settlor to the donee of the power to act on his behalf, as interests of a proprietary character; and, even if the authority was coupled with an interest of a proprietary character given to the donee, the mandatory aspect was quite as prominent as the proprietary. We shall now see that the personal and mandatory character which they possessed led the courts to lay down rules (*a*) as to the capacity of the donees of powers to execute them; (*b*) as to the power of these donees to delegate their exercise to others; and (*c*) as to revocations and new appointments made by virtue of them—all of which rules emphasized their mandatory aspect.

(*a*) *Capacity.*—The common law rules as to the capacity of a person under the disability of coverture or infancy to execute an authority, were not the same as the rules as to the capacity of persons under these disabilities to dispose of property; and, in considering the question of the capacity of a married woman or an infant to execute a power, it is from the former set of rules that the law started. Thus we have seen that a married woman could act as executrix and dispose of the property of the deceased in that capacity;[2] and the same principle was applied to an infant executor, provided that he was of age to be an executor;[3] so that, if a married woman or an infant was given power to sell the testator's land, they could sell it and give a good title to a purchaser. It follows that they have capacity to execute all powers simply collateral.[4] It is obvious, however, that more

forfeited, a bare executor (I mean without a devise of the residue) might forfeit his estate; this is power, yea, and 'tis a manacled power, it is a kind of trust that he may revoke," 1 Ventr. at p. 131 *per* Hale, C.J.

[1] Sugden, Powers 182. [2] Vol. iii 528.

[3] "If *cestui que use* before the statute desired that his executors should sell his land, a feme covert or infant executor, so he be of age to be executor, may sell his land," Grange v. Tiving (1665) O. Bridg. at p. 110.

[4] Sugden, Powers 153, 177; as Bridgman, C.J., put it in Grange v. Tiving (1665) O. Bridg. at p. 109, "In the case of a bare power or authority, when an infant or feme covert is used but as an instrument or conduit pipe, by another who hath no such disability, though upon the act an alteration or transferring of an estate do follow, yet the law looks upon him from whom that power or authority is derived, not upon the weakness of the person acting by it; and therefore an infant may, as an attorney, give livery upon a feoffment; so may a feme covert, though it be to her own husband"; and see ibid at pp. 114-115.

difficulty would be felt in applying these principles to powers which are not simply collateral. It might be said with some reason that, just as these powers were so closely akin to proprietary interests that they could be released or destroyed by a feoffment fine or recovery, so the question of the capacity of the donees of these powers to execute them should be decided by reference to the rules which govern the capacity of persons to dispose of their property. This view commended itself to Bridgman, C.J., in the case of *Grange v. Tiving*,[1] in which he held that infants and married women, though they might exercise a power of revocation,[2] could not exercise a power to appoint to new uses,[3] unless the settlor had so specially provided,[4] because such an act, being in effect an alienation of property, might be prejudicial to their interests. This view was not wholly logical. In fact his judgment hesitates between the proprietary and mandatory aspects of these powers. It is the reverse of the view which the law has followed in the case of the married woman; and it is not entirely the view which it has followed in the case of the infant.

A series of seventeenth century cases had applied to the execution of all powers given to a married woman the same rules as those which governed the execution of powers simply collateral.[5] Some of these cases come from the earlier half of the seventeenth century; and at the beginning of the eighteenth century they were accepted as good law, in spite of Bridgman's dicta;[6] so that the modern law that a married woman may execute any variety of power is partly, at any rate, due to the fact that it was settled at an early date. In the case of the infant, on the other hand, the law has followed a somewhat different course. The old law as to his capacity to execute a power simply collateral, whether over realty or personalty, has been followed;[7] and, till the decision

[1] "I hold both these powers of revoking and declaring new uses savour and taste of the estate of the land; and are not wholly collateral, as was objected at the bar," Grange v. Tiving (1665) O. Bridg. at p. 114; "In those acts that concern the disposition of an estate or interest the reason of the law turns, in case of infancy or coverture, upon the point of prejudice or not prejudice, unto their interest," ibid at p. 117.

[2] Ibid at p. 118—partly on the ground that these powers of revocation "have the greatest resemblance to conditions," of which an infant or feme covert could take advantage.

[3] "I do hold that Mary, though she may revoke the uses to her mother, yet cannot limit any use to her husband, or any other stranger during her minority; for that is apparent to her prejudice," ibid at p. 121.

[4] "I will not determine whether a lease, according to that power executed by that infant, or feme covert, be good or not; for without all doubt it might have been so limited by express words of the power . . . and then it had clearly been good; for if he who was owner of the estate had no disability upon him, he might make use of any hand, how weak soever, to reach out that estate," ibid 116.

[5] Daniel v. Ubley (1625) Latch 39; Harris v. Graham (1636) 1 Rolle Ab. 329 pl. 12; Gibbons v. Moulton (1678) Rep. t. Finch. 346.

[6] Tomlinson v. Dighton (1711) 1 P. Wms. 149; Sugden, Powers 153.

[7] Hearle v. Greenbank (1749) 3 Atk. at p. 710.

of Lord Hardwicke in *Hearle v. Greenbank* in 1749, there were grounds for thinking that the same law might be applied to powers appendant and in gross.[1] But in *Hearle v. Greenbank*[2] Lord Hardwicke drew a distinction between married women and infants, based upon the fact that the infant's disabilities were based on mental incapacity, whereas the married woman's disabilities were not. For this reason he held that an infant could not execute either a power appendant or a power in gross over real property.[3] This view of the law, therefore, approximates to the view of Bridgman, C.J. But, in respect to an infant's capacity to execute powers over personal estate, the question remained long unsettled. In 1880 Cotton, L.J., held that the same principle should be applied to personalty as was applied by Lord Hardwicke to realty, and on much the same grounds.[4] But Brett and James, L.JJ., and Jessel, M.R., held that an infant could exercise a power in gross.[5] It would seem also that an infant can exercise a power appendant over personalty, if the donor of the power so intended, because the infant is only exercising the will of the mandator.[6] Thus, in the case of powers given to infants over realty, the proprietary aspect of these powers has prevailed, and in the case of powers over personalty their mandatory aspect. It is difficult to justify the distinction,[7] which is quite as illogical as the distinction drawn by Bridgman, C.J., in *Grange v. Tiving*;[8] but it illustrates very forcibly the double character of powers, and the consequent difficulty of adjusting logically the conflicting claims arising from this double character.

(*b*) *Delegation.*—The common law applied to the earliest power with which it was acquainted the idea that it was a personal authority entrusted to the donee, and that therefore its exercise could not be delegated to another person.[9] This conception was extended to other powers, in all cases where the

[1] Hollingshead v. Hollingshead (1702), cited 2 P. Wms. at pp. 229, 230; Sugden, Powers 911.

[2] 3 Atk. 695.

[3] "Her disability doth not arise for want of reason; and it is upon this ground that the separate examination of a feme covert on a fine is good, because when delivered from her husband her judgment is free. . . . But an infant's disability is altogether from want of capacity," ibid at p. 712.

[4] Re D'Angibau (1880) 15 C.D. at p. 241.

[5] Ibid at pp. 235, 243-244, 246-247.

[6] Re Cardross's Settlement (1878) 7 C.D. 728; Re D'Angibau (1880) 15 C.D. at p. 243.

[7] "It is very difficult to see why, if discretion is required for the disposal of property, it should not be so in the case of the exercise of a power: and one would think there is as much judgment or discretion wanted for the exercise of a power as for the disposal of property. However, as the law stands, that appears not to be so; and the reason, if reason is to be found anywhere, seems to be this—that it requires more discretion to dispose of your own property than to dispose of other people's," Re D'Angibau 15 C.D. at p. 233 *per* Jessel, M.R.

[8] Above 181.

[9] Above 154.

exercise of this power was given to a particular person. Thus, in 1614 in *Combes's Case*, it was said that a power given to a tenant for life to make leases for twenty-one years was a personal power which could not be delegated.[1] But we have seen that the interests of the crown had led the courts to scrutinize carefully the distinction between powers which were inseparably annexed to the person and those which were not.[2] It is obvious that the same sort of considerations can be applied to determine whether or not a power could be delegated. A power which involves personal discretion is clearly a power mandatory in its nature, to which the maxim *delegatus non potest delegare* must apply.[3] On the other hand, there is no reason why a general power, which in substance gives the donee a right of property, should not be delegated by the donee, in exactly the same way as he can delegate the exercise of his rights of ownership.[4] A fortiori there is no reason why a power should not be delegated if it is to be exercised by the donee or his assigns.[5] These rules show that the evolution of the proprietary and the mandatory aspects of powers has enabled the courts to settle, on principles adapted to these two aspects, the question of the extent to which delegation can be admitted.

(*c*) *Revocations and new appointments.*—The construction of a power to revoke uses, and to appoint to new uses, has been largely determined by the mandatory aspect of powers. It was admitted in *Digges's Case* that, if a man had a power to revoke, he could "revoke part at one time and part at another time and so of the residue till he had revoked all. But he could revoke one part but once, unless he had a new power of revocation to the uses newly limited."[6] Clearly the limitation to a single revocation, unless a further power was specially given, is perfectly logical, if the power be regarded as a mere authority or mandate to revoke the uses already declared, given by the creator of the power to the donee of the power; for an authority to revoke the uses declared by the settlor cannot be extended to give an authority to revoke the uses declared by the donee of the authority, unless this extended authority is expressly given. This construction fell in with the disposition of the judges to

[1] 9 Co. Rep. at f. 76a, citing the case of Lady Gresham decided by Wray and Anderson, C.JJ., at the Suffolk Assizes, 1582.

[2] Above 178-180.

[3] Thus, in Ingram v. Ingram (1740) 2 Atk. 88, it was held that a power to a husband to appoint among the issue of the marriage in such proportions as he should see fit, could not be delegated to his wife.

[4] Sugden, Powers 180-181, 195-196; cp. Sergison v. Sealy (1743) 9 Mod. 390.

[5] How v. Whitfield (1679) 1 Ventr. 339.

[6] (1598-1600) 1 Co. Rep. at f. 173b.

assimilate these powers to common law conditions;[1] for it is clear that, when once a condition has been fulfilled, its operation is exhausted. And it is possible that the judges regarded an indefinite power to revoke as contrary to public policy, because it would render titles insecure, and facilitate frauds on purchasers.[2] This view of the law, which denies that a settlor may reserve an infinite power of revocation, but allows a new power of revocation to be reserved on each successive appointment, was adhered to in *Becket's Case*[3] in 1613 by Bromley and Altham, BB.; and it was finally declared to be good law by all the judges, and by the House of Lords in the case of *Hele v. Bond*[4] in 1717. Lord St. Leonards, though he found this decision hard to justify logically, admits that it has worked well.[5] Whether or not it can be logically justified, it must, I think, be regarded as another illustration of the manner in which the common law courts continued to adhere to the mandatory aspect of powers. The same point of view can also be seen in the rule, clearly laid down in *Whitlock's Case*, to the effect that the authority given by the power must be strictly pursued, so that if, for instance, "one hath power to make a lease for three lives, he cannot make a lease for ninety-nine years determinable on these lives."[6]

(2) *The additions made by the court of Chancery.*

Though the common law courts had recognized the proprietary aspect of certain varieties of powers, they had, as we have seen, maintained to an equal, if not to a greater extent, their mandatory aspect. We shall now see that the additions made by the court of Chancery to these common law rules all tended to emphasize their proprietary aspect. This is due mainly to the introduction into the law regulating these powers of ideas derived from the law of trusts. It is not of course true to say that equity treated all powers as being in the nature of trusts. It was, as we have seen, only certain powers which were so

[1] Above 166; see the note to Becket's Case (1613) Lane at p. 119; see also Sugden, Powers 370, commenting on a MS. report of Hele v. Bond, and the next note.

[2] Snig, B., in Becket's Case, Lane at p. 119 said that "it would be mischievous to declare infinite uses on uses"; in the argument on the appeal to the House of Lords in Hele v. Bond, as reported in Sugden, Powers App. at pp. 909, it was contended "that the powers could be exercised but once. And they likened powers of this nature to conditions at common law; and that at common law such a continuing condition as this could not have been created. They enlarged upon the endless contests which a contrary doctrine would introduce, and the dangers and frauds to which it would subject purchasers."

[3] Lane 118; S.C. 2 Rolle Ab. 262 pl. 2.

[4] Prec. in Ch. 474.

[5] Sugden, Powers 370.

[6] (1609) 8 Co. Rep. at f. 70 b; Jenkins v. Kemishe (1665) Hardres at p. 398 *per* Hale, C.B.; Roe v. Prideaux (1808) 10 East 158; Sugden, Powers 411, 519-520, 562; for the way in which equity has modified the law in this respect see below 186-187.

treated.[1] But, in order to carry out the intentions, actual or presumed, of the donors and donees of powers, and in order to avoid disappointing appointees who had some sort of a moral claim, equity made large modifications in the common law rules; and these modifications were often inspired by the ideas which it was accustomed to apply to the law of trusts. It was inevitable, therefore, that the large body of rules which thus grew up should emphasize the proprietary aspects of these powers, whether they were regarded from the point of view of the donee of the power or the appointee. Let us take one or two illustrations of the way in which this equitable interference modified the law in this direction.

We have seen that the rule that a settlor cannot reserve an infinite power of revocation, but that a new power of revocation may be reserved on each fresh appointment, emphasizes the mandatory aspect of powers.[2] On the other hand, Lord Nottingham in 1674, in the case of *Witham v. Bland*,[3] laid it down that a power of revocation, reserved in an original settlement to the settlor, implied a power to make a new appointment, as otherwise the settlor would lose his estate. The estate would be in the feoffees to uses, who would hold it to their own use, as no further uses could be declared unless this implied power existed. This was not permissible, as it would be in effect contrary to the trust intended by the parties—a clear indication of the influence of the trust concept. Clearly, too, Lord Nottingham's reasoning proceeds on the ground that such a power is in effect the property of the settlor. This is shown, partly by the fact that he held the rule to be inapplicable to a stranger who had a power simply collateral;[4] and partly by the manner in which he assimilated a power to make a new appointment to the power of alienation naturally incident to property, and contrasted with it a power of revocation, because a power of alienation is, while a power of revocation is not, naturally incident to a right of property. "No man," he says, "can have a power of revocation unless he reserves it, no man can want a power of limitation unless he excludes himself from it."[5] If seems to follow, therefore, that ideas,

[1] Above 173. [2] Above 183-184.

[3] 3 Swanst. 277; and see Smith v. Wheeler (1668) 1 Mod. at p. 40, where Twisden, J., said, "whoever hath a power of revocation, hath a power of limitation, the reason is because else the feoffees would be seised to their own use"; but, as Sugden pointed out, Powers 375, Bridgman, C.J., did not consider that the feoffees would be seised to their own use, "and such it is apprehended is the law, although the point does not at this day arise upon an original settlement, as the power to revoke clearly authorizes an appointment also."

[4] When a power of revocation is reserved to a stranger, he has no power of limitation unless reserved; *secus ubi* the feoffor himself has the power to revoke," 3 Swanst. at p. 311.

[5] Ibid.

borrowed from the conceptions both of trust and property, had, in the seventeenth century, begun to affect the law applied to powers of revocation which were not simply collateral. Other ideas borrowed from the trust concept affected the view held by common lawyers that a power, because it was a mandate, could not be given to a series of unascertained persons.[1] Thus in the case of *Mansel v. Mansel*[2] it was argued that a power to consent to a jointure could not be given to trustees and their heirs, because it was "absurd to place a confidence or trust in persons who are not known to the party who trusts them." But this, it was truly said, "would be an objection against creating any trusts which would last longer than the lives of the persons trusted. There is a necessity for trusting persons, who cannot be personally known, in order to effectuate men's intentions in the exercise of that dominion which the law gives them over their properties. There is nothing absurd in trusting persons not known, nothing incongruous or repugnant to the rules of law. If there was, the uniting an authority with an interest could not legitimate it, because it does not remove the objection, which is that I do not personally know whom I trust."[3] And, in fact, even the common law had sometimes admitted that an authority could be given to unknown persons.[4] On these grounds, which clearly proceed on the analogy of the capacity of a settlor to impose a trust on unascertained persons, it was held that a power can be given to unascertained persons, if it is clear that the donor of the power so intended.[5]

These illustrations show the influence exercised by ideas derived from the law of trusts, in the direction of developing the proprietary aspect of the interest of the donee of a power. The manner in which the court of Chancery treated certain cases in which the donee had not strictly pursued the power, by granting a larger estate than he had authority to grant, illustrate a development of their proprietary aspect in the interests both of the donees of powers and their appointees. We have seen that any such deviation was strictly construed at law.[6] A deviation of this kind, from the mandate given to the donee of the power, was fatal to the validity of the appointment. But, as early as 1663,[7] it was resolved "that when a person hath power to lease for ten years and he leaseth for twenty, it is good in equity for ten"; in 1675

[1] Anon. (1564) Moore 61 *per* Weston, J.; in Y.B. 19 Hy. VIII. Trin. pl. 4 this view was so strictly adhered to that it was held that, if a power of sale were given to executors, the executor of an executor could not sell.

[2] (1757) Wilmot at p. 48.

[3] Ibid.

[4] See Anon. (1564) Moore 61-62, cited ibid.

[5] Sugden, Powers 130-131.

[6] Above 184.

[7] Parry v. Brown 2 Free. 171.

Lord Nottingham said that the resolution in *Whitlock's Case* "may be laughed at";[1] and in 1698[2] the court laid down some of the principles upon which it was prepared to give relief against these defective executions of powers. Further developments of the same ideas can be seen in the rules evolved by equity, firstly as to the effect of the non-execution of powers, secondly as to the effect of formal defects in their execution, and thirdly as to the mode of their exercise.

Firstly, though the court of Chancery always regarded a power as being prima facie discretionary, and therefore declined to interfere if it was not executed,[3] the growth of the idea that some powers were in the nature of trusts introduced a considerable exception to this rule; and, in fact, gave the beneficiaries something which was hardly distinguishable from an equitable interest in the property.[4] Secondly, though the court of Chancery adhered to the mandatory aspect of powers in the strictness with which it compelled the donee of the power to adhere to all the formalities (however absurd) prescribed by the donor of the power,[5] yet the numerous cases in which it gave relief against a defective execution constituted a series of large concessions, in the interest of the appointees, to the opposite point of view. The bases of this relief was clearly stated by Lord Macclesfield in *Coventry v. Coventry*[6] in 1724. He said that after the statute of Uses, "the courts of common law held that powers in derogation of estates executed were to be taken strictly; and therefore, if not pursued, they would not impeach or destroy an estate already executed by legal conveyances. But in the courts of equity they soon found that the construction was too artificial, and not according to natural equity; and therefore they construed these powers as a reservation of so much of the ancient dominion of the estate, to

[1] Smith v. Ashton 1 Free. at p. 309; For Whitlock's Case see above 184.

[2] Anon. 2 Free. 224-225—"First difference, between a power created by act of parliament, which should always be taken strictly and equity will not help it; but if it be void at law it is void in equity; but when it is created by the act of the party there in the case of a purchaser, or of a provision for a child, although the power be not strictly pursued, equity will help it, at least to make it good so far, as it might have been good by virtue of the power if it had been duly executed. . . . Second difference, where a lease be made purely voluntary, and no provision for a child, then if the lease be not good at law, it shall never be made good in equity. But if a lease be made to a tenant at a rack rent without a fine, which is voluntary, yet if the tenant hath been at any considerable expense, in building or improving, then the court will supply the defective execution of the power"; cp. Campbell v. Leach (1775) Ambler at p. 748 *per* De Grey, C.J.

[3] Arundell v. Philpot (1688) 2 Vern. 69—"This court may supply an informal or defective revocation, but cannot make a revocation where there is none."

[4] Above 173.

[5] See e.g. Bath and Mountague's Case (1693) 3 Ch. Cas. at p. 90 *per* Treby, C.J.; cp. Hawkins v. Kemp (1803) 3 East at pp. 439-441 *per* Lord Ellenborough, C.J.; Sugden, Powers 206-208.

[6] 1 Str. at pp. 601-602.

be under the control of the tenant for life. Et cujus est dare illius est disponere ; and as often as any such dominion is reserved, the tenant for life may contract about it; and where a marriage contract is made, as this was, in contemplation of the exercise of such a power, it was a real lien on the estate; for both the marriage was had, and the marriage portion paid, in contemplation that the charge would be laid on the estate in pursuance of the power." This jurisdiction was at first most extensively employed in relation to powers to raise jointures or portions, or otherwise to carry out the intentions of the parties to family settlements; and at one time there was a disposition to confine the relief to such cases;[1] but, as early as 1698, the court was prepared to extend it to powers to lease, when the lessee could be considered to be in the nature of a purchaser.[2] Thirdly, during the eighteenth century, equity supervised the mode of the exercise of powers. We have seen that the court interfered to prevent the appointment of an illusory share to one of a class of beneficiaries.[3] A fortiori equity interfered to set aside a fraudulent execution of a power in the interests of the persons damaged by the fraud—as, for instance, where a father got the consent of a trustee to an appointment in favour of a younger son by falsely representing his elder son as undutiful and extravagant.[4]

Naturally the close consideration of various kinds of powers, which the exercise of this equitable jurisdiction involved, tended to elucidate the character of the various kinds of proprietary interests conferred by the various classes of powers. In particular, the fact that a general power amounted in substance to a gift made by the creator of the power to the donee, while a special power amounted to a gift made by the creator to the appointee, was recognized, and practical deductions were drawn therefrom. Thus, if a man has a general power, it is regarded as a power only until it is executed; and, if not executed, it cannot be made available for his creditors;[5] but it was very early settled that, if it was executed, the creditors could make the property appointed available to satisfy their claims in preference to the claims of the

[1] Sugden, Powers 564, citing Powell, Powers 389; Medwin v. Sandham (1789) 3 Swanst. 685.

[2] 2 Free. 224, cited above 187 n. 2; Sugden, Powers 566.

[3] Above 174-175.

[4] Scroggs v. Scroggs (1755) Ambler 272.

[5] "The court has not gone so far, as when a man has power to raise money, if he neglect to execute that power, to do it for him; although he thought that might be reasonable enough and agreeable to equity in favour of creditors, Lassells v. Cornwallis (1704) 2 Vern. at p. 465; "The difference between a non-execution and a defective execution of a power; the latter will always be aided in equity . . . it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party, whether to execute or not," Tollet v. Tollet (1728) 2 P. Wms. at p. 490.

appointees.[1] Similarly, though, at the latter part of the seventeenth century, it never seems to have occurred to anyone that the rule against perpetuities applied to powers,[2] it was generally recognized, at the end of the eighteenth century, that powers were interests of so distinctly a proprietary character that this rule was applicable to them. And it was also recognized that it must be applied in a different way to general and special powers. A general power gives the donee absolute ownership, and so does not restrict the alienability of the property over which it exists. Therefore the period allowed by the rule is reckoned from the time when the power is exercised. A special power, on the other hand, does restrict the alienability of the property over which it exists from the moment of its creation. Therefore the period allowed by the rule is reckoned from the time when the power is created.[3]

In the development of the equitable rules as to powers, as in the development of other branches of equity, the common law basis from which the equitable rules were developed was meagre as compared with the equitable superstructure. In this section I have hardly touched the fringe of one of the most detailed and complicated branches of equity. But it will, I think, be clear from these few illustrations, that, though the mandatory aspect of powers has not been wholly set aside, the broad result of the treatment of powers by the court of Chancery, in the seventeenth and eighteenth centuries, has been the development of their proprietary aspect, and the regulation of the incidents of different classes of powers according as they approached more or less nearly to rights of property. This process has necessarily involved the ascertainment of the rights and duties of the donors of powers, of donees, and of their appointees, in the property which is the subject of the power. The settlement of these questions has determined the main characteristics of this new species of proprietary interest in the land, and has therefore fixed

[1] Thompson v. Towne (1694) 2 Vern. 319; Lassells v. Cornwallis (1704) 2 Vern. 465; Lord Townshend v. Windham (1750) 2 Ves. Sen. 1; and see Lord Sumner's judgment in O'Grady v. Wilmot [1916] 2 A.C. at p. 270.

[2] In the case of Grange v. Tiving (1665) Bridg. 107 a power was given to the settlor or to any of the heirs of his body to revoke or change the uses; but no objection to the validity of the power on ground that it infringed the rules against perpetuities seems to have been made; cp. Sugden, Powers, 152; Gray, Perpetuities (2nd ed.) 376 n. 2; as we shall see, below 221-223, the rule against perpetuities was then in a very experimental stage.

[3] See authorities cited by Gray, op. cit. 410 n. 2; Gray, op. cit. 410-411 says, "The text writers all agree that such is the law; and this opinion is so eminently sensible and so in accordance with the spirit of the rule against perpetuities that a contrary decision is not to be anticipated. The view of Mr. Powell in his note to Fearne that the exercise of general powers is the same in the matter of perpetuity as that of special powers, has not had any following."

its sphere in the land law. But, before I can deal with its influence on the land law, I must say a very few words as to the effects of the statutory developments of the nineteenth century.

(3) *The principal changes made by the Legislature.*

The statutes which abolished the doctrine of illusory appointments, and amended the law as to exclusive and non-exclusive powers, restored, as we have seen, to the donees of powers some of that free discretion of which they had been deprived by the court of Chancery.[1] As they emphasized the discretionary character, which is the essence of the idea of a power as compared with a trust, they may be said to have weakened to a small extent their proprietary aspect. But, subject to this exception, the legislation of the nineteenth century has tended to emphasize this aspect of powers. Three illustrations will make this clear.

Firstly, the tendency to allow the free alienation of all rights, led to the permission to release all powers, even powers simply collateral,[2] other than powers in the nature of trusts.[3] Secondly, the inconvenience of allowing the creators of powers to require the observance of what formalities they please, has led to the enactment of statutes which provide that, whatever formalities may be required, a power to be exercised by will is well exercised by a will in the form required by the Wills Act 1837;[4] and that a power to be executed by deed is well executed by a deed attested by two or more witnesses.[5] These statutes thus assimilate the formalities required for the execution of powers to the formalities required for the disposition of property. Thirdly, powers which the donee might have exercised for his own benefit are liable to be taken in execution under the Judgments Act, 1838,[6] and vest in and can be exercised by the trustee in the bankruptcy of the donee.[7]

The statutes of Uses and Wills had increased the powers of landowners to determine the future devolution of their property, by making it possible for them to create future legal interests in the land by means of the machinery of the use and the devise. The flexibility and adaptability, which was characteristic of these two modes of dealing with property, had now been imparted to the legal estate in the land. "Because uses," it was said in *Chudleigh's Case*,[8] "were so subtle and ungovernable," they were by the statute of Uses "coupled and married to the land which of all the elements is the most ponderous and immovable." But

[1] Above 175.
[2] 44, 45 Victoria c. 41 § 52.
[3] Halsbury, Laws of England xxiii 64.
[4] 7 William IV., 1 Victoria c. 26 §§ 9, 10.
[5] 22, 23 Victoria c. 35 § 12.
[6] 1, 2 Victoria c. 110 § 11.
[7] 4, 5 George V. c. 59 § 38 (2) (*b*).
[8] (1589-1595) 1 Co. Rep. at f. 124a.

evil communications had corrupted good manners. To a large extent the subtlety and ungovernability of uses had been imparted to legal estates in the land. This fact was pointed out by Walmesley, J., when he said that, though the title of the statute in course of pleading was *Statutum de usibus in possessionem transferendis*, yet, "if a man look to the working of the Statute he would think it should be turned the other way, *de possessionibus ad usus transferendis.*"[1] Still larger control was given to landowners by the development of powers of appointment operating under the statute of Uses; for, by their means, authority could be given to trustees, and limited owners under settlements, to deal with the property as and when occasion arose, in accordance with varying needs occasioned either by family vicissitudes, or by the requirements of estate management.

Thus it may be said that the statutes of Uses and Wills had both enabled landowners to make secure settlements of their property, and had corrected some of the defects of these settlements, by enabling settlors to retain for themselves, or to grant to their successors, the powers of appointment needed to enable them to deal with future contingencies as and when these contingencies arose. Indeed, but for the development of the law relating to these powers of appointment, the system of strictly settling property would have been, as I have already pointed out, almost unworkable. The insertion of these powers mitigated, to some extent, the consequences of allowing land to remain in the hands of a series of limited owners;[2] and no doubt it was the perception of this fact which induced the courts of law and equity to conbine in assisting their development.

The fact that these powers thus rendered the system of strict settlement possible constitutes their main contribution to the land law. That they were able to have this large effect, is due to that mixture of the conceptions of authority or mandate and property, which, as we have seen, they have possessed throughout their history. One man can give another an authority or mandate to act for him for an indefinite period of time; and, if the authority is wide enough, that other can do on his behalf a large number of different things, as and when he may judge these things to be necessary in the circumstances. On the other hand, the settlement of property is an act which is done once and for all. No doubt the property may be limited in different ways according to different contingencies; but all these contingencies must be provided for in advance; and there can be no variation once the

[1] Cited by Bacon, Reading on the Statute of Uses, Works vii 417; see the whole passage cited above 123.

[2] Above 161-162.

settlement is executed. The development of powers of appointment has introduced into settlements of property some of the capacity for variation, some of the adaptability to future exigencies, which belong pre-eminently to the conception of authority or mandate. These powers are authorities or mandates; but they are authorities or mandates to deal with property, given to some person to be exercised either in his own interest, or in the interest of others; and so naturally they tended to assume, to a greater or a lesser degree, the character of interests in the property over which they exist—interests which, according to the circumstances, may be regarded as the interests of the donor of the power, of the donee, or of the appointees. They were, as Bridgman, C.J., truly said "*a novum compositum*"—of a "mixed nature."[1]

In fact I think we may say that their influence in the sphere of the law of property, and more especially in the sphere of the land law, is closely parallel to the influence of the conception of negotiability in the sphere of mercantile law; and this is due to the fact that the technical reason for the parallel influence of both these very different sets of legal institutions is very similar. Both were a "*novum compositum*"—of a "mixed nature." We shall see that the peculiar characteristics of negotiability are traceable ultimately to the fact that it consists in an ingenious inter-mixture of principles taken from the law of contract, with principles taken from the law of property.[2] Similarly the peculiar characteristic of these powers of appointment consists in the fact that they embody an ingenious admixture of principles taken from the law of agency, with principles taken from the law of property.

The development of these powers had thus made the system of strict settlement possible, by giving settlors the opportunity of creating more extended facilities for dealing with settled property than would otherwise have been possible. But the insertion of these powers was optional. They need not be inserted in settlements; and, if inserted, they might be very limited in their scope. Moreover they might, as we shall see, be used with the object of frustrating those rules to prevent the tying up of property in perpetuity, which the courts were evolving.[3] In fact, during the latter part of the sixteenth century, it was becoming clear that many settlors were prepared to use all their large new rights of disposition which they had gained through the development of law as to contingent remainders, through the operation of the statutes of Uses and Wills, and through the

[1] Grange v. Tiving (1665) Bridg. at p. 112, cited above 152.
[2] Vol. viii 145.
[3] Below 199, 209 n. 1.

development of trusts, for the purpose of destroying that freedom of alienation which, from an early date, it had been a fixed principle of the common law to establish and maintain. It was becoming clear that these settlors desired to create settlements which would have the effect of vesting their property in a perpetual series of limited owners. And so with the object of frustrating these attempts to create perpetuities, the courts began to enforce rigidly, and even to extend, old rules applicable to the limitation of estates, and to create new rules. To the history of the development and application of these rules new and old we must now turn.

§ 6. The Rules Against Perpetuities

We have seen that from a very early period the common law had shown a strong bias in favour of freedom of alienation. The rule laid down by Bracton, early in the thirteenth century, that the word "heirs" is a word of limitation and not of purchase, shows that the older rules laid down by Glanvil, which restricted alienation in the interest of the heir, had become obsolete;[1] and the later developments of this rule, which became known as the rule in *Shelley's Case*,[2] had a similar influence in promoting the freedom of alienation. We have seen, too, that Bracton argued for the abolition of all restrictions on alienation imposed in the interest of the lord.[3] His views prevailed, and in 1290, by the statute Quia Emptores, freedom of alienation as against their lords was secured for all tenants, save tenants in chief.[4] The statute did not apply to the king. He could therefore still prevent his tenants from alienating; but at the beginning of Edward III.'s reign they too got freedom of alienation.[5] The manner in which, at a somewhat later period, the courts aided the frustration of the statute De Donis, by giving efficacy to the common recovery, is a striking instance of the continuance of this bias in favour of freedom of alienation.[6] The rules which had thus been evolved at the close of the mediæval period seemed sufficiently to safeguard this principle; and they did in fact safeguard it during the Middle Ages. But the new powers, which landowners had acquired in the sixteenth century, showed that the mediæval rules were no longer sufficient. We have seen that by means of contingent remainders, shifting and springing uses, executory devises, and powers of appointment, it had become possible so to settle property that it must, for an indefinite period, continue to be enjoyed by a series of limited owners, no one of whom had complete powers of alienation.

[1] Vol. iii 73-75. [2] Ibid 107-111. [3] Ibid 77-78.
[4] Ibid 80-81. [5] Ibid 81, 83-84. [6] Ibid 118-120.

During the latter half of the sixteenth century landowners began to realise the fact that they could thus settle their property; and they began to make these settlements. Just as in the Middle Ages alienation into mortmain showed that landowners would, unless restrained, use their power to alienate freely so as to destroy that power;[1] so now, the settlements attempted by them showed that they wished to do much the same thing, by so tying up their land that no future owner should have complete power of alienation. These settlements show that they hoped to be able to restore again those unbarrable entails which, though sanctioned by the Legislature in the thirteenth, had been finally frustrated by the courts in the fifteenth century. Thus the struggle of the courts to maintain the principle of freedom of alienation entered upon a new phase. The courts found it necessary to lay down rules to prevent settlements which created what was in effect an unbarrable entail, or, as the lawyers of the sixteenth century and later called it, "a perpetuity."[2] This struggle against these attempts of the landowners, and later of the owners of other kinds of property, resulted in the gradual evolution of different rules against perpetuities, all designed to ensure that property should not be vested in limited owners for an indefinite period.

It was only gradually that the courts came to appreciate the nature of this new problem with which they were faced, and to provide an effective solution. They laid down rules from time to time to meet the various devices employed by the landowners. Here, as in all other branches of English law, they advanced from precedent to precedent, till the repeated consideration of many cases gradually led them to a true understanding of the nature of the problem, and of the rules which were needed to deal adequately with it. Hence we get at different periods many different rules laid down, which represent different plans adopted to meet different devices to create a perpetuity; and often these rules have little in common, except the general object of frustrating the creation of unbarrable entails, and settlements of property upon a succession of limited owners in perpetuity. In fact the development of this branch of the law, having been left almost entirely to the courts, has all the characteristic defects of case law. The ground has been encumbered, and still to some extent is encumbered, with many rules invented for the purpose of coping

[1] Vol. iii 86-87.

[2] As Mr. Sweet points out, L.Q.R. xvii 170, the word perpetuity has been used in at least three different senses—(i) an inalienable interest, (ii) a limitation in the nature of an unbarrable estate tail, and (iii) an interest which is void for remoteness under the modern rule against perpetuities; we shall see that the second is the oldest meaning of the term, and that the other two are later meanings which have grown up as the law developed; obviously it is necessary, especially in reading the earlier cases and writers, to be sure in which sense the term is being used.

with devices employed to create perpetuities at different periods in the history of the law,—rules propounded before the true nature of the problem was correctly appreciated. It is for this reason that it has been truly said that this branch of the law "is particularly distinguished by what the Romans termed *inelegantia juris*." [1]

The earliest devices employed by the landowners to create a perpetuity were, as we shall see, comparatively simple. They attempted, firstly, to create unbarrable entails; [2] and, secondly, to evade the liability of contingent remainders to destruction, by creating remainders by way of uses.[3] We shall see that the courts pronounced to be void all limitations which attempted to create an unbarrable entail; [4] and that they laid down the rule that remainders created by way of use were as liable to destruction as remainders created at common law.[5] We shall see too, that, with a view to render impossible contingent remainders which might vest at too remote a period, they laid it down that, after a contingent remainder to an unborn person for life, no contingent remainder could be limited to that unborn person's children.[6] Moreover, we have seen that, in order to give these rules a wider operation, they laid it down as a rule of law that any limitation which could be construed as a contingent remainder must be so construed; so that all limitations thus construed were equally destructible.[7] Some of these rules still exist, either in their original or in a modified form; but developments which had been taking place in the law as to executory interests at the beginning of the seventeenth century, showed that they suffered from the defects of being both too limited in their scope and inadequate in their contents. They were too limited in their scope because they did not apply to limitations which, not being able to take effect as contingent remainders, were held to be not destructible like these remainders. They were inadequate in their contents because they were, for the most part, merely negative. They condemned certain sorts of limitations, or rendered them liable to destruction in certain ways; but they gave no information to landowners what limitations were valid. They laid down no positive rule for their guidance. What was wanted was a rule which was both positive and negative—a rule which would tell owners of property both what settlements they might, and what they might not, make.

We shall see that, during the course of the seventeenth century, it was gradually becoming apparent to the courts that the

[1] Williams, Real Property (22nd ed.) 424.
[2] Below 205-209.
[3] Below 203.
[4] Below 205-209.
[5] Below 203.
[6] Below 209-211.
[7] Above 126-128.

evil to be guarded against was the remoteness of the time at which a limited interest was made to vest.[1] One of the older rules regulating contingent remainders—the rule that, if a contingent remainder were limited to an unborn person for life, a contingent remainder to that unborn person's children was invalid[2]—did guard against this evil. But, though the judges were beginning to see that the prevention of remoteness of vesting was the main object to be aimed at, their vision was obscured by the many other rules which had been previously invented to meet the various devices of the landowners. They were all agreed that a perpetuity, i.e. a settlement which created what was in substance an unbarrable entail, must be prevented; but they were not clear sighted enough to lay down boldly a general rule designed to prevent remoteness of vesting, because such a general rule seemed to conflict with some of the older rules laid down in earlier cases. The court of Chancery, not being entangled to so great an extent with the rules laid down in earlier cases, had a clearer vision.[3] Lord Nottingham in the *Duke of Norfolk's Case*,[4] disregarding the opinions of the judges, laid down the general rule which is now known as the modern rule against perpetuities; and his decision was upheld by the House of Lords in 1685. That rule, as we shall see, did what was required, because it was both positive and negative. According to that rule, as finally settled, any interest which must vest within a life or lives in being and twenty-one years after is valid: any interest which may vest at a period more remote is invalid.[5] Thus the rule tells the owners of property both what they may do, and what they may not do; and it is a general rule applicable to all kinds of property. The general principle laid down in 1685, that it is the time at which a future interest must vest that must be regarded in considering whether any given limitation infringes the rule against perpetuities, has been elaborated by the courts during the following centuries.[6] But it has not abrogated the older rules except in so far as they were directly contradictory to it.[7]

In one respect, however, this rule has been found to be defective. At the end of the eighteenth century, the will of Peter Thellusson showed that it allowed the owners of property too great a latitude in the creation of trusts for the accumulation of their property. This defect was remedied by the Legislature; so that special rules of statutory origin, distinct from the rules against perpetuities, regulate trusts directing accumulations.[8]

[1] Below 221-223. [2] Below 209-211. [3] Below 222 223.
[4] (1681) 3 Ch. Cas. 1; Pollex. 223; 2 Ch. Rep. 229; 2 Swanst. 454; below 223-224.
[5] Below 226-227. [6] Ibid. [7] Below 234-237.
[8] Below 228-231.

Thus the rules regulating perpetuities are diverse in their character, because they come from different periods in the history of the law. But, in spite of their diversity, they are closely related to one another, both because they aim at effecting similar results, and because, throughout their history, they have exercised a reciprocal influence upon one another. Hence in modern law some very difficult problems have arisen as to their mutual relations.[1] These problems are not as yet completely settled; but some quite modern decisions have gone a long way towards a final settlement. The following account of the development of the different rules regulating this branch of the law, will, I think, show that a knowledge of their history is essential to a proper understanding of the nature of these problems; and that it is therefore a condition precedent to their correct solution.

This short sketch of the evolution of this branch of the law indicates the chronological divisions into which the subject naturally falls. They are as follows:—The Older Rules Against Perpetuities; the Modern Rule Against Perpetuities; the Rule Against Accumulations; the Relation Between These Various Rules.

The Older Rules Against Perpetuities

A treatise entitled "The Use of the Law,"[2] which was probably written at the end of the sixteenth or the beginning of the seventeenth century, affords clear evidence, both of the novelty of the attempts of the landowners to create perpetuities, and of the meaning which the lawyers of that day attached to the term "perpetuity." The writer notes that, since it had become possible to bar estates tail, "there is started up a device called perpetuity; which is an entail with an addition of a proviso conditional, tied to his estate, not to put away the land from the next heir; and if he do to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniencies of entails."[3] In fact, it is probable that it was shortly after the middle of the sixteenth century that landowners began to attempt to create these perpetuities. It is true that the case of *Manning v. Andrews*[4] shows us that, in 1517, a landowner limited his lands by way of use, in such a way that each of his heirs took only an estate for life. In other words, he created a perpetual freehold. But there is no indication that such settlements were then general. In fact the evidence is rather the other

[1] Below 234-237.

[2] This tract is attributed (probably falsely) to Bacon, and is printed in Spedding's Edition of his Works, vol. vii 453-504; vol. v. 397 n. 7.

[3] Bacon, Works vii 491.

[4] 1 Leo. 256; vol. iv 441 n. 4; Gray, Perpetuities §§ 132, 132a; L.Q.R. xv 73 n. 4; xxix 307-308.

way; for we have seen that, before Mary's reign, no instance has been found of a settlement in which contingent remainders were limited to unborn persons.[1] But the settlement in *Chudleigh's Case*,[2] which gave contingent remainders to the use of unborn children of living persons, was made in 1556; and the will in *Scholastica's Case*,[3] which provided that the estate limited to each tenant in tail should cease, and go over to the next tenant in tail, in the event of any attempt to sell waste mortgage or discontinue, was made 1558. It would therefore seem to be the fact that it was from the beginning of Elizabeth's reign onwards that these attempts to create perpetuities began to be common. The cases which came before the courts in that and the two succeeding reigns, illustrate the nature of the earliest devices by which the landowners endeavoured to effect their objects; and later cases show the persistence of the landowners, when these earlier devices had been frustrated by the courts.

In dealing with the history of this contest between the courts and the landowners, it will be necessary, in the first place, to say something of the reasons put forward by the courts for their view that public policy demanded the frustration of the attempts of the landowners to create perpetuities. I shall then give some account of the devices employed by the landowners to attain their object, and of the frustration of these devices by the gradual creation of the older rules against perpetuities.

(1) *The reasons why the courts held that the creation of perpetuities was contrary to public policy.*

The reasons why the courts were firmly resolved to suppress these attempts to create perpetuities are fully explained in many cases of the sixteenth and early seventeenth centuries; and they were reproduced in a bill "to take awaie future uses creatinge perpetuities of lande in speciall cases," which was introduced into the House of Lords and read a first time in 1597.[4] These reasons were excellently summed up by Bacon in his argument in *Chudleigh's Case*,[5] and they were reproduced in the judgments in that case,[6] and in other contemporary cases.[7] It is clear from *Chudleigh's Case* that considerable reliance was placed on the

[1] Vol. iv 441.

[2] (1589-1595) 1 Co. Rep. 120a; Popham 70; 1 Anderson 309; for an account and an explanation of the limitations in that case see L.Q.R. xiii 4.

[3] Newis and Scholastica his wife v. Lark (1572) Plowden 408.

[4] Calendared in third Rep. Hist. MSS. Com. 10, and printed in App. II. to this volume; for some further account of it see L.Q.R. xxxv 258, and below 214, 218, 219, 237.

[5] Works (Ed. Spedding) vii 625-627. [6] 1 Co. Rep. 123b seqq.

[7] Mildmay's Case (1606) 6 Co. Rep. at ff. 42b, 43a; Mary Portington's Case (1614) 10 Co. Rep. at ff. 38a, 42b.

preamble to the statue of Uses. Though, as we have seen, this preamble is far from being a sober historical narrative,[1] it has considerable historical importance in this connection, because it was not difficult to prove that the mischiefs, there stated to flow from the existing practice of settlements to uses, were a fortiori true of settlements to uses which were designed to create perpetuities. As Bacon's argument on these lines, and the other reasons which he adduced, may be taken to represent the current professional opinion; and as this argument and these reasons are there more clearly expressed than in any other statement, I shall reproduce them almost in full:—

The mischiefs detailed in the preamble to the statute of Uses are, he says, eight in number.[2] "The first is the passing of the land without the solemnity and evidence of instruments, by mere words, signs, and tokens. A man makes a feoffment, not to the use of his last Will, . . . but he limits certain uses and afterwards says that if by his last Will, (and he says not in writing) he declares new uses, the first uses shall cease and the seisin shall be to these new uses: now shall these uses rise well by parol or Will nuncupative. In like manner if he insert a clause, that if he delivers on his deathbed the ring he commonly wears on his finger to anyone, that the first uses shall be determined and the seisin shall be to the use of him to whom he delivers it: now on the delivery of the ring lands pass by signs and tokens.

"The second mischief in the statute is the disinheriting of heirs, which is a thing of great moment; for the disposition of the land after death is to the heir according to the law, and other dispositions are of humour and respect, and though the law of 32 Hen. VIII. *de voluntatibus* favour voluntary dispositions, yet it leaves a third part to the heir; but if a feoffment be made, as in the cases before put, the heir shall have nothing.

"The third mischief in the preamble is the depriving of the lords of their benefit of ward. A man makes a feoffment to the uses of his first son, and after to the second and the third, and dies, they being within age; now shall his first son be in ward, for it is a feoffment within the statute of 32 Hen. VIII.; but if the eldest son come to full age and die without issue, then will the second son not be in ward, for he comes in as purchaser. This child begins to thrive betimes and purchases his father's land; and so by this fiction of law the lord is defrauded of his ward.

"The fourth mischief in the preamble is the uncertainty of assurances to purchasers, which is the most general complaint.

[1] Vol. iv 460. [2] Works vii 625-627.

For although a man take all the most binding assurances, as fine, feoffment, recovery, warranty, yet the sleight of the contingencies slips from them all: and if he think to be sure by procuring all to join who have an interest, yet this helps not; for how can one join who will be born several years after. And if all the land in the realm were in such conveyances all would be as in mortmain,—no change, no intercourse; but we should have the faction which troubles divers states of *novi cives et veteres cives;* for lands should rest in certain families, and others could be but their farmers.

"The fifth mischief is the uncertainty of tenants to the præcipe. A man makes a feoffment to the use of J. D., and if J. S. pay such a sum then to the use of J. S.; a stranger who has *eigne* right to the land brings *præcipe* against J. D., J. S. pays the money: the tenancy is gone, and if he pursue his recovery all is void. But had this been a condition at common law, there an entry would have been necessary, of which the plaintiff could have notice; but this use not only takes away the tenancy but steals it without overt act, merely by operation of law.

"The sixth mischief is the loss of tenancy by curtesy and dower. If such a perpetuity be created where the issue successively enjoys the estate for life only by way of use, now there is clearly no tenancy by curtesy or dower. . . .

"The seventh mischief is the perjury in trials of such secret conveyances; because it is a good rule *sine fide instrumentorum perit fides testimoniorum:* for these close and unpublished conveyances ever bring forth corrupt and perjured trials. And the extremity of this mischief does not yet appear, because the [existing] conveyances, for the most part, are fresh in memory: but when passage of time has obliterated their memory, it will be a labyrinth of uncertainties, and so continual occasion of false oaths.

"The eighth mischief is the damage the Crown sustains in attainders. *Hac conditione vivitur:* all subjects hold their lives as well as their land and goods on condition that they commit not certain crimes prohibited; and if they infringe the conditions the law resumes one and the other. But now life, which is the greater, remains subject to the law, but the land, which is the less, is delivered; and the traitor shall be executed, yet the statute executes the use for the land; and whereas men were accustomed to fly for treason, now the land flieth. And so it is plain that all the mischiefs which the statute intended arise as strongly, and more so, on contingent uses."

Bacon then went on to reinforce this argument, derived from the preamble to the statute of Uses, by showing that the creation

of perpetuities, by means of these contingent uses, were contrary to public policy, to humanity, to the discipline of families, and to clearness and certainty in the rules of law.[1]

They were contrary to public policy. "We should consider the perils immanent in the present estate; who see in this time the desperate humours of divers men in devising treason and conspiracies; who being such men that, in the course of their ambition or other furious apprehensions, they make very small or no account of their proper lives; if to the common desire and sweetness of life the natural regard for their posterity be not adjoined, the bridle, I doubt, will be too weak: for when they see that whatever comes of themselves, yet their posterity shall not be overthrown, they will be made more audacious to attempt such matters. And another reason of State may be added . . . and that is the peril which necessarily grows to any State, if the greatness of men's possessions be in discontented races; the which must necessarily follow if, notwithstanding the attainder of the father, the son shall succeed in his line and estate."[2]

They were contrary to humanity. "A man is taken prisoner in war. Life and liberty are more precious than land or goods. For his ransom it is necessary for him to sell. If then he be shackled in such conveyances, he is as much captive to his conveyances as to his enemy, and so must die in misery to make his son and heir after him live in jollity. Some young heir when he first comes to the float of his living outcompasseth himself in expenses; yet perhaps in good time reclaims himself, and has a desire to recover his estates; but has no readier way than to sell a parcel to free himself from the biting and consuming interest. But now he cannot redeem himself with his proper means, and though he be reclaimed in mind, yet can he not remedy his estate."[3]

They were contrary to the discipline of families. "Though I reverence the laws of my country, yet I observe one defect in them; and that is, there is no footstep there of the reverend *potestas patria* which was so commended in ancient times. . . . This only yet remains: if the father has any patrimony and the son be disobedient, he may disinherit him; if he will not deserve his blessing he shall not have his living. But this device of perpetuities has taken this power from the father likewise; and has tied and made subject (as the proverb is) the parents to their cradle, and so notwithstanding he has the curse of his father, yet he shall have the land of his grandfather."[4]

They were contrary to clearness and certainty in the rules of

[1] Works vii 632-635.
[2] Ibid 633-634.
[3] Ibid 634.
[4] Ibid 634-635.

law. "If this clause which is put in perpetuities be considered, that is to say, that the land shall remain upon forfeiture to him who is next in limitation, as if the other committing the forfeiture were dead, it is not possible for the most learned judge to answer the questions. For there will be heirs without death, the which is a thing prodigious in our law, and is a common highway to many subtle questions."[1]

Some of these reasons, which weighed with the judges of the sixteenth century, have ceased to be applicable. The incidents of tenure are things of the past; and, rightly or wrongly, forfeiture for treason is abolished. Changes in legal procedure and in modes of conveyancing have obviated some other objections. But there are yet other objections which always have been, and always will remain valid. It is inexpedient, both from the point of view of the landowners and the public, that land "should be as in mortmain," tied up in the hands of a succession of limited owners. Even the very limited extent to which the law did allow the creation of perpetuities, has illustrated the fact that they make for complexity in the law, and facilitate fraud. The settlements, which later rules of law and equity have enabled English landowners to make, are one of the main causes for the complexity of the English land law; and the opportunities afforded by the continued division between the legal and equitable estate, have been taken advantage of to perpetrate cruel frauds on purchasers and mortgagees. The provisions of the Settled Land Acts, and one of the clauses of the Conveyancing Act (1882),[2] show that, in spite of all the efforts of the courts, land may be tied up in a manner which is detrimental both to the interests of landowners and to the public. We cannot doubt but that the evils resulting from these perpetuities would have been far greater, if the courts had not, from the first, striven hard, and striven with a considerable measure of success, to frustrate them. To the devices employed by the landowners to create perpetuities, and to their frustration by the evolution of the older rules against perpetuities, we must now turn.

(2) *The devices employed by the landowners and their frustration by the creation of the older rules against perpetuities.*

We have seen that, after the passing of the statutes of Uses and Wills, very difficult questions arose as to the manner in which the uses, turned into legal estates by these statutes, should be treated. Some lawyers thought that the machinery of the use could be employed just as it was employed before the statute;

[1] Works vii 635. [2] 45, 46 Victoria c. 39 § 10; below 228.

and that the statute would turn all the uses, which a settlor created, into legal estates. Other lawyers took precisely the opposite view, and held that it was the intention of the statute of Uses to extirpate all uses "limited in a new manner not agreeable to the ancient common laws of the land."[1] Neither of these extreme views as to the effect of the statute prevailed;[2] but we have seen that the latter view so far prevailed, that certain of the common law rules as to the limitation of estates were applied to these new future estates in the land; and that these common law rules all had, directly or indirectly, the effect of preventing the creation of a perpetuity. Both the rules which defined the cases where a settlor took by virtue of his old use as a sort of reversion,[3] and the rule that any future estate which could be regarded as a contingent remainder must be so regarded,[4] had this result; and the rule which treated all these future estates in freeholds as destructible by those having vested interests in the land, just as if they were contingent remainders, was even more efficacious.[5] Seeing that, during almost the whole of the sixteenth century, the common law either declined to recognize, or treated as destructible, executory devises of terms,[6] it was hardly possible that a perpetuity could be created by their means. Therefore the older rules aimed at frustrating the efforts of settlors and testators to create perpetuities by the creation of future estates in freeholds. It would seem that, at the close of the sixteenth century, the courts considered that the best safeguard against the creation of perpetuities by their means was, if possible, to treat them as contingent remainders or, if that was not possible, to apply to them many of the rules which regulated contingent remainders.

It follows, therefore, that the older rules, directed to prevent the creation of perpetuities, centre round the rules regulating the limitation of contingent remainders. From the point of view of their effect in preventing perpetuities, we can divide these rules into two classes: firstly, the rule which made contingent remainders destructible; and, secondly, the rules which were designed to prevent a contingent remainder from vesting at too remote a date. Of the rules which made contingent remainders destructible I have already spoken.[7] We have seen that, till the invention of trustees to preserve contingent remainders, contingent remainders were so easily destroyed by persons having vested estates in the land, that there was very little danger that

[1] Chudleigh's Case (1589-1595) 1 Co. Rep. at f. 138a *per* Popham, C.J.; above 123-124.
[2] Above 125. [3] Above 125-126. [4] Above 126-128.
[5] Above 128-129. [6] Above 129. [7] Above 104-111.

a perpetuity could be created by their means. But we have seen that, at a later date, this liability to destruction was in a large measure obviated by the invention of trustees to preserve contingent remainders.[1] Thus it comes about that, from the point of view of the prevention of perpetuities, it is the rules which had the effect of preventing a remainder vesting at too remote a date which are the most important. These rules were three in number: firstly, the rule that a remainder will fail if it is not ready to vest when the precedent estate determines; secondly, the rule that all provisos designed to prevent a tenant in tail from barring his entail are void; and, thirdly, the rule which prevents the creation of a perpetual freehold by way of contingent remainder.

(i) We have seen that, though contingent remainders were protected against the acts of those having vested interests in the land by the invention of trustees to preserve them, they were still liable to fail if they were not ready to vest when the precedent estate determined.[2] This was and is one very effectual safeguard against the creation of a perpetuity, for the following reasons: A contingent remainder must be limited to take effect either after a life estate or an estate tail. If it is limited to take effect after a life estate it must vest, if at all, within the compass of a life in being. If it is limited to take effect immediately after an estate tail it may be destroyed at any time by the process of barring the estate tail, so that its existence does not render the property inalienable. It is true that, in certain cases, the Contingent Remainders Act (1877)[3] saves from destruction contingent remainders which are not ready to vest when the precedent estate determines; but only those contingent remainders are saved which comply with the modern rule against perpetuities. Thus contingent remainders limited to take effect within twenty-one years of the dropping of the precedent life estate, or limited to take effect immediately after the expiration of an estate tail, are not contrary to the modern rule against perpetuities, and so are saved by the Act of 1877. But, if a contingent remainder is so limited that an interval may elapse between the expiration of the estate tail and the vesting of the remainder,[4] or if it is limited to take effect at an interval of more than twenty-one years after the dropping of the preceding life estate, it is not saved by the Act of 1877, because in neither case does it comply with the modern rule against perpetuities. In these cases, therefore, in which a remainder still fails if it is not ready to vest when the precedent

[1] Above 111-114. [2] Above 115.
[3] 40, 41 Victoria c. 33; above 115.
[4] Gray, Perpetuities §§ 450, 451; Jarman, Wills (6th ed.) 322-323.

estate determines, this liability to failure operates to prevent the creation of a perpetuity.

(ii) The fact that the larger number of settlements, in which settlors endeavoured to create perpetuities, took the form of unbarrable entails, is illustrated by the definition of a perpetuity cited above,[1] by the conveyancing precedents of this period,[2] and by the cases which came before the courts.

In 1585[3] an attempt was made to make use of the statute of Henry VIII.'s reign,[4] which prevented an estate tail granted by the crown from being barred, so long as the reversion continued in the crown. A remainderman in fee, expectant upon an estate tail, made a grant in tail of his remainder, with remainder in fee to the crown. But this device was easily shown to be ineffective by a consideration of the wording of Henry VIII.'s statute; that statute, it was held, only applied to estates tail created by the king, or to cases where the king, for valuable consideration, had procured from a subject the grant of an estate tail to a third person, with remainder to the king.[5]

Generally settlors adopted more direct methods to effect their object. Thus in *Corbet's Case*[6] there was a covenant to stand seised of a certain manor to the use of C for life, and after his death to the use of R and the heirs male of his body, and in default of such issue to the use of A and the heirs male of his body, with divers remainders over. It was further provided that, if R "or any of his heirs male of his body should be resolved and determine, or advisedly should attempt, or procure any act or thing concerning any alienation of or for the said manor etc., by which any estate tail before limited should be undone, barred, or determined, or by which the same should not come, remain, and be in manner and form as is limited by the same indenture; that then after that, and before any such act done . . . the uses and estates to him limited who should so do etc., should cease only in respect, and having regard to such person so attempting, in the same manner, quality, degree, and condition as if such person so attempting was naturally dead and not otherwise. And that then immediately, in all such cases, the uses of the said manor should be to such persons to whom the uses should come by the intent of the same indenture, as if such person so attempting was naturally dead."[7] Substantially similar limitations were

[1] Above 197.

[2] For some account of the published collections of these precedents see vol. v 388-390; vol. vi 603-605.

[3] Wiseman's Case 2 Co. Rep. 15a.

[4] 34, 35 Henry VIII. c. 20; a precedent for this kind of limitation is given by West, Symboleography (ed. 1615) § 296.

[5] 2 Co. Rep. at f. 16a.

[6] (1599-1600) 1 Co. Rep. 83b.

[7] 1 Co. Rep. at ff. 83b, 84a.

made in two other cases cited in *Corbet's Case*,[1] and in *Mildmay's Case*.[2] But in all these cases the court held that a condition, providing that the interest of the tenant in tail should cease as if he were dead, was void for several reasons. Firstly, because it was both contrary to law, and repugnant to the nature of the interest granted, to make an estate tail cease as to the tenant, but keep it subsisting as to his issue;[3] secondly, because, if an interest could be thus forfeited upon mere attempts to aliene, titles would be wholly uncertain;[4] and thirdly, because it is as much an inseparable incident of an estate tail that it should be able to be barred by a recovery, as freedom of alienation is an inseparable incident of an estate in fee simple.[5] A proviso of this kind was therefore repugnant to the nature of the estate granted; and both Littleton's criticisms of Rickhill's settlement,[6] and *Plesington's Case*[7] were cited in support or illustration of this view.

The device adopted in *Mary Portington's Case*[8] avoided these objections by providing that, on the doing of any act which prevented the lands from descending as limited by the will of the testator, the estate of the person doing such an act should cease *as if he or she were dead without an heir of his or her body*.[9] It

[1] Germin v. Arscot (1595), cited 1 Co. Rep. at f. 85a; Chomley v. Humble (1595) cited ibid at f. 86a.

[2] (1606) 6 Co. Rep. 40a.

[3] "It was resolved that it was impossible and repugnant that an estate tail should cease as if the tenant in tail was dead (had he issue or no), for an estate tail cannot cease so long as it continues; but here his intent was to continue the estate tail; and to cease it in respect to the party offending only, and not as to any other, which is impossible and repugnant and against law; for every limitation or condition ought to defeat the whole estate, and not to defeat part of the estate," Mildmay's Case (1606) 6 Co. Rep. at f. 40b; cp. Corbet's Case (1599-1600) 1 Co. Rep. at ff. 85b, 86a.

[4] "It was resolved that these words 'attempt etc.' or 'go about etc.' . . . are words incertain and void in law, and God forbid that the inheritances and estates of men should depend on such incertainty. . . . For if one who is bound with such a perpetuity goes to counsel learned, to know whether he might alien part for payment of his debts, or for advancement of his younger children, or for any other needful use, is that a breach of the proviso or not," Mildmay's Case at ff. 42a, 42b; cp. Bacon's argument in Chudleigh's Case, above 201.

[5] Mildmay's Case at ff. 41a, 41b.

[6] Corbet's Case at f. 88a; Mildmay's Case at f. 42b; above 89-91.

[7] Fitzherbert, Ab. *Quid Juris Clamat* pl. 20 (6 Rich. II.); The case is thus summarized by Anderson, C.J., in Corbet's Case at f. 84b, "A man makes a lease upon condition, that if the lessor grant the reversion, that the lessee shall have the fee; if the lessor grant the reversion by fine, he shall not have the fee, for the condition is repugnant and void."

[8] (1614) 10 Co. Rep. at 35b.

[9] 10 Co. Rep. at ff. 36a, 36b; as Fearne says, Contingent Remainders (9th ed.) 259, "In the former cases the proviso was repugnant to a rule of law, as being confined to the avoiding only part of the estate tail, viz. so far only as respected tenant in tail himself, still leaving it good as to his issue; and also involved something contradictory and absurd in itself, being to determine the estate tail, as if tenant in tail were dead; which in fact does not determine the estate tail. Whereas the case of Mary Portington steered clear of these objections; the proviso there enuring to defeat the whole estate tail; and to determine the estate tail as if tenant in tail were dead without heirs of his body; which really is a determination of the estate tail."

was very strenuously argued in that case that this proviso was perfectly valid; and cases could be cited in support of this proposition. In 1572, in the case generally known as *Scholastica's Case*,[1] a testator devised an estate tail, and attached to it a proviso, that, if the tenant in tail sold wasted morgaged or discontinued the estate tail, the estate tail should wholly cease. It was held that this proviso, though not valid as a condition, was valid as a limitation; and that, upon the tenant in tail levying a fine and suffering a recovery, the entry of the tenant in tail next entitled under the will was justified.[2] In 1586, in the case of *Rudhall v. Milward*,[3] the breach of a similar proviso, by levying a fine, was held to operate either as a condition or a limitation, and to entitle the next remainderman, who was also the heir at law of the testator, to enter. So, too, in *Corbet's Case*, Walmesley, J., had said that, "in the case at bar the donor might have annexed a condition or limitation to determine his estate."[4] But in *Mary Portington's Case* the judges, seeing that the admission of the validity of these provisos would obviously facilitate the creation of perpetuities, determined not to allow them. And so with some heat,[5] occasioned no doubt by the consciousness that the law was not so clear as they would have liked, they explained,[6] or denied[7] the validity of *Scholastica's Case*, and pronounced the proviso to be invalid. Coke truly says that, as the result of this case and the previous cases on this topic, "the freeholds of the subject are thereby set at liberty from these fettered inheritances."[8] And they had been completely freed; for it had been already resolved in *Capel's Case*[9] that a common recovery, suffered by a tenant in tail, barred not only all remainders and reversions expectant on his estate, but also all charges created by the tenants in remainder and reversion on their estates.

These cases were decisive. Henceforth it was accepted as a fundamental principle, both at law and in equity, that any attempt to create a perpetuity by means of an unbarrable entail was void.[10]

[1] Plowden 408; above 198.

[2] "And all the justices agreed upon the matter in law, viz. that the said clause of restraint shall be a limitation which shall determine the estates, and not a condition requiring re-entry, and that by the said acts, viz. the bargain fine and recovery, the estates tail were ended, and that the plaintiffs might enter," Plowden, at p. 414.

[3] Moore 212.

[4] 1 Co. Rep. at f. 86b.

[5] "In truth none ought to be heard in dispute against the legal pillars of common assurances of lands and inheritances of the subjects. And at the Parliament held in the reign of the late Queen Elizabeth, in the great case between T. Vernon and Sir Edward Herbert . . . there Hood, an utter-barrister of counsel with Vernon . . . rashly and with great ill will inveighed against common recoveries . . .; who was with great gravity and some sharpness reproved by Sir James Dyer . . . who said he was not worthy to be of the profession of the law who durst speak against common recoveries, which were the sinews of assurances of inheritances," 10 Co. Rep. at f. 40a.

[6] Ibid at f. 42a.

[7] Ibid at ff. 40a, 40b.

[8] Ibid at f. 42b.

[9] (1581-1593) 1 Co. Rep. 61b.

[10] L.Q.R. xxv 396.

In 1610, in the case of *Tatton v. Molineux*,[1] it was held that, though in equity a trust of a term of years could be created in favour of one for life with remainder over in tail, and though the tenant for life or the first grantee in tail could be prevented from defeating the remainder,[2] yet any attempt by this means to create an unbarrable entail was void.[3] But in the later case of *Leventhorpe v. Ashbie*,[4] decided in 1635, it was held that the first grantee in tail had complete power of disposition, and a remainder over in tail was void; so that, if a term was entailed to B and the heirs male of his body, remainder to C and the heirs male of his body, the remainder to C was void. The reason was that, as such entails of a term were unbarrable, they would, if allowed, have been obvious methods of getting round the effect of the decisions that no device could hinder a tenant in tail from barring his entail.[5] The principle that such limitations were void was fully admitted by Lord Nottingham in the *Duke of Norfolk's Case*.[6] "The matter chiefly insisted on," he said, "is that the limitation . . . tends directly to a perpetuity. If this be so there needs no other reasons or arguments to destroy it, for the law hath so long laboured to defeat perpetuities, that now it is become a sufficient reason of itself against any settlement to say it tends to a perpetuity. Let us, *ergo*, examine what a perpetuity is. . . . A perpetuity is a settlement of an estate or interest in tail, with such remainders

[1] Moore 809-810.

[2] This would seem to be the meaning of the report when it says, "Si le remainder du tiel terme soit limit ouster, le particuler donee en taile ou pur vie ne poit ceo vender al prejudice del remainder"—i.e. it was good for a life in being.

[3] "Et nota le Seignior Chancellor cite le Case d'un Poole, l'ou l'eigne frere done le terre al Germane Poole le second frere voluntariment, et les heires de son corps, ove remainder al un puisne frere en taile, et fist chescun d'eux dentrer en un statute al auter que il ne alieneroit, et quia ceux statutes fuerunt en substance de faire un perpetuity, quel le state d'Angleterre ne poit porter, ideo les statutes . . . per le advice de Coke Chiefe Justice del Common Pleas fuerunt cancelles"; in the note of this case in Tothill 83, the case is stated somewhat differently—"The plaintiff hath full power to dispose of his lease so long as he hath an heir, and that an entail of a trust of or out of a chattel is not good, nor any such perpetuity"; with this version the report in Pollex. 24 agrees; possibly this version and that in Moore may be reconciled by supposing that the sentence in Moore (cited above n. 2) refers to a tenant in tail after possibility of issue extinct—a state of things which could not exist in Tatton v. Molineux.

[4] 1 Rolle Ab. *Devise* L. pl. 1.

[5] "Ceo est un void remaynder al C, pur ceo que ceo est a commencer sur un limitation de mort de B sans heires male de son corps, que est pluis remote, et per le devise devant al B et heires male de son corps engender, B ad tout le terme le quel viendra al son executors, et nemy al son issue, et il ad tout le power de disposition de ceo a que il luy pleist durant le terme, et sil ne dispose de ceo uncore son executors averont ceo sil morust sans issue, et ne revertera al executor de A (the testator) . . . *per* Curiam resolve sur un triall al barr, et ils nollent suffer ceo destre argue pur le cleerness de ceo"; we shall see that this difference between the reasoning in Moore's version of Tatton v. Molineux, which was decided in the Chancery, and this case, is interesting from the point of view of the development of the modern rule against perpetuities, below 222-223.

[6] (1681) 2 Swanst. at p. 460.

over that no act of alienation of the present tenant in tail can ever bar those remainders; but they must continue perpetually, and be as a cloud hanging over the present possession: such perpetuities fight against God, by affecting a stability which human providence can never attain to, and are utterly against the reason and policy of the common law." After this decisive statement, the courts invariably pronounced to be void any limitation whatever which obviously aimed, by any means, at creating an unbarrable entail. It was stated as an obvious truism in the *Duke of Marlborough v. Godolphin* that the law "admitted no perpetuities by way of entails"; [1] and in *Mainwaring v. Baxter* [2] a trust, which tended to prevent the tenant in tail from exercising his power to bar the entail, was held to be void. It may therefore be taken as established law that any limitations, which in any way tend to fetter the power of the tenant in tail to bar the entail, are void under this rule.

(iii) By the end of the sixteenth century, it was well understood that contingent remainders could not be limited to a series of unborn persons, one after another, in such a way that a perpetual freehold was created. The rule on this subject was, for the first time, clearly laid down in Coke's argument in *Perrot's Case* in 1595.[3] He had no difficulty in showing that the creation of a perpetual freehold was in effect a perpetuity; and he laid down the rule, which has since prevailed, as to the conditions under which such a grant should be held to be valid. An estate might be limited to one for life, remainder to his unborn son for life; but all further limitations after that life estate were void.[4]

[1] (1759) 1 Eden at p. 416; in that case land was devised to trustees to the use of several persons for life, with remainder to the use of their first and other sons successively in tail male; and the trustees were directed, on the birth of each son, to revoke this use limited to him, and to limit the land to his use for life, remainder to his first and other sons successively in tail male.

[2] (1800) 5 Ves. 458; in that case land was strictly settled in tail, but the estate of the tenant in tail was made subject to a term of 1000 years limited to trustees on trust, if any tenant in tail barred the entail, to raise £5000 and to pay it to the person next in remainder.

[3] Moore 368; in that case a settlor, in order to "insure the continuance of his lands in his name and blood," limited a succession of life interests to the use of his son William, and then to the son of his son, and after his decease "ad usum omnium et singulorum filiorum et exituum masculorum del corps le dit William per sa primer feme que il marrieroit, unius post alterum in talibus cursu modo et forma prout eadem separatim et successive descendere debuissent eis, uni post alterum per debitum cursum legis pro et durante omnibus et singulis termino et terminis naturalis vitæ et vitarum omnium et cujuslibet dictorum filiorum et exituum masculorum." A similar attempt to create a perpetual freehold was made as late as 1804; in the case of Seaward v. Willock, 5 East 198, there was a devise to A for life, and after his death to his eldest or any other son after him, for life, and, after them, to as many of his descendants issue male as shall be heirs of his or their bodies, down to the 10th generation, during their natural lives.

[4] "Il conclude ceo point que l'estate de frank tenement en remainder al Sir Tho. Perrot est bon a luy et chescun fitz que fuit en esse durant son vie, mes nient ouster: et sic de touts les autres persons nosme en le remainder et lour fitz," Moore at p. 372.

This was entirely in accord with the established rules regulating the limitation of contingent remainders. As we have seen, such a remainder could be limited to the heir of a living person;[1] and therefore, necessarily, a remainder to the unborn child of a living person was good. Any further remainder was bad as tending to the creation of a perpetuity. Coke's argument was no doubt founded on the dicta of the judges in *Chudleigh's Case*,[2] to which he refers; and their dicta were accepted as good law by the legal writers of the seventeenth and eighteenth centuries.[3] In the eighteenth century, the rule was upheld by Lord Keeper Henley in the *Duke of Marlborough v. Godolphin;*[4] and it was stated, in what is perhaps its most complete and authoritative form, by Fearne in that part of his work in which he is treating of executory devises.[5] In the nineteenth century it was applied to legal contingent remainders;[6] and in the twentieth century, to an equitable contingent remainder created by will.[7]

Fearne, following the sixteenth century cases, treats the rule as an illustration of the principle "that any limitation in future or by way of remainder of lands of inheritance which in its nature tends to a perpetuity . . . is by our courts considered as void in its creation." In other words, limitations of this kind are open to exactly the same objections as an unbarrable entail. Therefore, just as limitations which indirectly had the effect of creating such an entail were held to be void,[8] so limitations which indirectly

[1] Above 87.

[2] "If a feoffment be made to the use of A for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only; in this case, if this limitation should be good, the inheritance should be in no body; but this limitation is merely void, for the limitation of a use to have a perpetual freehold is not agreeable with the rule of law in estates in possession," 1 Co. Rep. at f. 138a *per* Popham, C.J.; Popham does not say expressly that a remainder for life to the unborn son of a living person is good—probably because he thought it obvious. On this matter it will be seen I agree with the reasoning of Mr. Sweet, on whose articles the text is founded, rather than with Gray; for this controversy see L.Q.R. xv 73-74; Gray, Perpetuities 267-269; L.Q.R. xxv 389-390; ibid xxix 26 (article by Gray), 304 (reply by Mr. Sweet).

[3] Shepherd, Touchstone 506; Gilbert, Uses 77; both cited L.Q.R. xv 74.

[4] (1759) 1 Eden 404; as the Real Property Commissioners pointed out (Third Report 30) the effect of the limitations in that case was to create "a succession of estates for life by way of substitution for the original estate tail."

[5] "Any limitation in future or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void; and there is no carrying the estate to them, but by comprising them in the extent of the estate limited to their parents, namely to the unborn children of the person *in esse;* that is by giving such unborn children of the person *in esse*, an estate of inheritance, which is an estate tail," Contingent Remainders (9th ed.) 502.

[6] Whitby v. Mitchell (1889) 42 C.D. 494; 44 C.D. 85.

[7] Re Nash [1910] 1 Ch. 1.

[8] Above 208-209.

had the effect of creating a perpetual freehold were similarly treated. Thus, in the case of *Somerville v. Lethbridge*,[1] the rule was applied to the limitation of terms of 99 years for successive lives. As Fearne points out,[2] this rule has dictated the conveyancing practice in strict settlements of limiting an estate tail to the first and other sons; "for though a child unborn might take an estate for life as well as an estate tail, yet such estate would not extend to the issue of such child, and no estate limited to such issue as purchasers would be good."

In one respect only has the rule been modified by the application of what is known as the "cyprès" doctrine. It was laid down by Cowper, L.C., in *Humbertson v. Humbertson*[3] in 1716, that, when such an attempt to create a perpetual freehold has been made by will, the court will do what it can to effectuate the testator's intention, by giving to persons in being life estates, and to their unborn sons estates tail. But this exception, though established law, was not wholly approved by later judges; they were not inclined to extend it;[4] and it is now settled that it is only if the testator's intention can be thus effectuated that this doctrine will be applied.[5]

When the rule, that after a contingent remainder to an unborn person for life there could be no second remainder to that unborn person's children, was first stated, it applied, as we have seen, to legal contingent remainders, and therefore to other limitations which were so construed. It was then supported on many various grounds. Firstly, though a contingent remainder to the heirs of a living person might be suffered, yet it was something of an exception to the rules of the common law;[6] for, pending the contingency, the inheritance was in no one.[7] Therefore that exception could not be extended to validate a set of contingent remainders which would put the inheritance into abeyance for an indefinite time.[8] Such contingent remainders were void under the rule that a contingent remainder could not be limited upon an event which was illegal or impossible.[9] Secondly, the limitation of an indefinite number of life estates obviously tended to deprive the king of his incidents of tenure; and this objection naturally figures prominently in the earlier cases.[10] Thirdly, such

[1] (1795) 6 T.R. 213. [2] Op. cit. 502-503. [3] 1 P. Wms. 332.
[4] Brudenell v. Elwes (1802) 7 Ves. at p. 390 *per* Lord Eldon.
[5] Monypenny v. Dering (1847) 16 M. and W. 418.
[6] Above 87, 89. [7] Above 86.
[8] See Popham, C.J.'s, statement, above 210 n. 2.
[9] Above 89.
[10] "Les perpetuels frank tenements sont mischievous en le commonwealth et al Corone un grand inconvenience, car sils estoieront en force, ceo defeatera le Corone de touts escheats, gardships, liveries, et primer seisins que en ancient temps, et per le prerogative royal, doient vener per mort ou forfeiture des tenants et subjects al

limitations obviously tended to a perpetuity both in the old sense of that term, because they created interests like an unbarrable entail, which were not completely alienable; and in the modern sense of that term, because they created limited interests which might prevent the whole fee from vesting for an indefinite period.[1] It is this last reason which is the reason for the rule in modern law. It is on this ground that it was justified in the *Duke of Marlborough v. Godolphin* in 1759,[2] and in *In re Nash* in 1910.[3]

Thus explained, the rule is both intelligible and wholly consonant with the historical development of the law on this subject. Unfortunately counsel has been darkened, and the law confused, by the notion that the rule is an example of the supposed principle that there cannot be a possibility upon a possibility. We have seen that that supposed principle was applied in two quite distinct ways.[4] In the first place, it was used to differentiate between the character of the contingencies upon which a remainder was based. If the contingency was too remotely improbable, it was said to be based upon a double possibility, and therefore void. But we have seen that this application of the doctrine was discredited in the *Duke of Norfolk's Case*, and is now entirely exploded, because it is apparent that the remoteness of the probability of the contingency, upon which a remainder is based, cannot affect in any way its tendency to create a perpetuity.[5] In the second place, this supposed principle was invoked as a reason against the validity of interests limited to vest, not upon a too remote probability, but at too remote a period.[6] It is this application of the principle which has confused the rule which we have just been considering, because the rule that, after a contingent remainder to an unborn person for life you cannot limit a second contingent remainder to that unborn person's child, was represented as being merely a consequence of it.

This second application of the principle was not made till later than the first. We can see signs of it in the earlier half of the seventeenth century;[7] in the latter half of the century the

Roys," Perrot's Case (1595) Moore at p. 371; Chudleigh's Case 1 Co. Rep. at f. 139b *per* Popham, C.J.; Bacon's argument cited above 199; for the importance then attached to this consideration, which played a large part in causing the enactment of the statute of Uses, see vol. iv 450-461, 472.

[1] Above 210.
[2] 1 Eden at pp. 416-419.
[3] [1910] 1 Ch. at p. 7.
[4] Above 99.
[5] Above 97-98.
[6] Above 100-101.

[7] Thus in Bennet v. Lewknor (1617) 1 Rolle Rep. at p. 357 Serjeant Finch, arguing against the validity of an executory devise of a term to a person *in esse* at the testator's death, after a devise of the term to A and his heirs male, said "si ceo bon remainder donque serra un possibilitie sur un possibilitie"; in Child v. Baylie (1618) Cro. Jac. at p. 461 Crew and Croke *arg.* said, "Here the limitation being to William after the death of the devisor's wife, of all his estate and interest to him and his as-

principle is clearly applied in this way;[1] and, in the eighteenth century, it was again applied in this way in the case of *Chapman v. Brown*.[2] In that case the testator had, in effect, limited an estate to an unborn person for life, with a contingent remainder to the unborn person's first and other sons in tail.[3] This second contingent remainder was held to be void, not only because it infringed the rule which we have been discussing, but because "a possibility cannot be devised upon a possibility";[4] and this view seems to have been taken by Booth[5] in advising on this case, and by Phillip Yorke in advising on another case.[6] It has been suggested by Mr. Sweet that this is authority for a rule, applicable only to legal contingent remainders, preventing the creation of a contingent remainder after a contingent remainder.[7] But there is little authority for such a suggested rule. The actual decision in *Chapman v. Brown* only exemplifies the rule that, after a contingent remainder to an unborn person for life, you cannot limit a second contingent remainder to that unborn person's children; so that the suggested rule really rests only on the use made in *Chapman v. Brown* of the supposed principle that there can be no possibility on a possibility; and that principle has now been very properly declared to be non-existent.[8] Nor do the recent cases give any colour to this suggested rule. Though the court in *In re Frost*[9] apparently believed in the supposed principle that there

signs, it is but a remainder; for the wife may outlive all the term, and then this devise of the remainder of the term is given to him in particular, and William hath but a possibility; and then to limit it to Thomas after the death of William then living, is to limit a possibility on a possibility, which is against the rules of law"; see also Saunders v. Cornish (1630) Cro. Car. 230.

[1] In Pearse v. Reeve (1670) Pollex. at p. 30, Hide, Twisden and Browne, JJ., certified the lord chancellor that the trust of a term for the unborn children of living persons, when they attained twenty-one was void because it was "a possibility on a possibility, which cannot be by the rules of law."

[2] (1759) 3 Burr. 1626; 3 Bro. P.C. 269.

[3] See Wilbraham's Opinion cited L.Q.R. xxvii 169.

[4] 3 Burr. at p. 1634 *per* Lord Mansfield, C.J.; "you cannot limit a nonentity upon a nonentity, a possibility upon a possibility," ibid at p. 1635 *per* Wilmot, J.

[5] L.Q.R. xiv 243.

[6] "A contingent remainder must vest during the life, or immediately upon the death, of the devisee of the particular estate which precedes it, such devisee being *in esse* at the time when the will speaks, but it cannot be made to wait or expect the vesting of another estate, prior in limitation and equally contingent with itself. The law does not allow a contingency to depend upon a contingency, or one possibility to be thus raised upon another," cited L.Q.R. xxx 354.

[7] L.Q.R. xxx 354-355; cp. L.Q.R. xxvii 168-171.

[8] "We are of opinion that the rule against limiting land to an unborn child for life with remainder to his unborn child applies to equitable as well as to legal estates. We think that the rule should be so expressed, and that the phrase 'possibility on a possibility' should not be used. . . . It was never a general rule . . . although it was no doubt given by Lord Coke as a reason for the real and intelligible rule that estates cannot be limited to an unborn child for life with remainder to his unborn child," In re Nash [1910] 1 Ch. at pp. 9-10.

[9] (1889) 43 C.D. 246.

can be no possibility on a possibility, it based its decision, partly at any rate, on the ground that the second contingent remainder was void because it infringed the modern rule against perpetuities; and this reason for the decision was followed in *In re Ashforth*.[2] It therefore follows that, if the rule that after a contingent remainder to an unborn person for life, no second contingent remainder can be limited to his children, is not broken, a contingent remainder can be limited to take effect after a contingent remainder, provided that the second contingent remainder must vest within the time allowed by the modern rule against perpetuities.

Thus all these devices to create, either an unbarrable entail, or a perpetual freehold, were eventually declared to be invalid by the courts; but, in the sixteenth century, while the law was uncertain, there is no doubt that much inconvenience was caused. Landowners were so set upon the creation of these perpetuities that they were prepared to take the risk. As Bacon said: "It is likely that counsellors of the law have advised men in such cases, that when the cases come to be scanned it is hard to argue how the law will be taken; but in the meantime, if they prove void, yet the law varies as it chances, and it will be a bridle on the heir that he shall not venture to sell, and a scruple to the purchaser that he shall not buy; and so it is but a conveyance adventured."[2] It is not surprising that in 1597 an attempt was made to deal with the situation by statute.[3] But we shall see that the provisions of the proposed bill would have been in some respects too stringent, and in other respects inadequate;[4] and so it failed to get beyond a first reading. As a matter of fact the interference of the Legislature was not necessary; for we have seen that the courts were then fully resolved, as they always have been resolved both before and since, to stamp out these perpetuities; and, at a time when the nature of the problem to be solved was but imperfectly seen, a solution gradually evolved by the courts was more likely to be satisfactory than any hastily made legislative rule. No doubt a codification of the law as to perpetuities is very desirable at the present day; but in 1597 the Legislature hardly possessed the necessary knowledge to make a satisfactory statute. The law was as yet in the experimental stage; and much consideration of the devices of many settlors and testators was needed, before a principle emerged upon which a general and a permanent rule could be founded. To the emergence of this principle, upon which the modern rule against perpetuities is founded, we must now turn.

[1] [1905] 1 Ch. 535.
[2] Argument in Chudleigh's Case, Works vii 623.
[3] Above 198; App. II.
[4] Below 218-219.

The Modern Rule Against Perpetuities

The history of the rules against perpetuities has been more fully considered within the last half century than the history of any other branch of the land law. No doubt this is largely due to the fact that, as these rules are wholly judge-made, it is impossible to ascertain their relation to one another, and their application to the facts of concrete cases, without an enquiry into the various *rationes decidendi* of the many decisions and authoritative statements of various dates, upon which they depend. However that may be, there is no doubt that the searching historical scrutiny to which they have been constantly submitted considerably lightens the task of the legal historian. Of recent years the two men who have done more than any others to elucidate the history of these rules are Mr. Sweet and the late Professor Gray. Mr. Sweet has elucidated the history of those older rules against perpetuities which has just been related;[1] and my debt to his researches and acumen will be obvious to all those of my readers who are acquainted with his work. Professor Gray is pre-eminently the historian of the modern rule against perpetuities.[2] Of the merits of his work, both as a history and as a statement of modern law, it is hardly necessary to speak. It is sufficient to say that his book shares with Professor Dicey's book on the Conflict of Laws, the fame of being as nearly a book of authority in our courts as any modern book is ever allowed to be; and that it is one of the few American law books which have attained this distinction. Hence my statement of the history of the modern rule in this section, though somewhat differently arranged, and told from a somewhat different point of view, must be largely a summary of Professor Gray's results.

In relating the history of a legal doctrine it conduces to clearness to begin by stating the modern form of the doctrine. The modern rule against perpetuities is thus stated by Williams:—[3] "The rule against perpetuities requires every future estate limited to arise by way of shifting use or executory devise to be such as

[1] His contributions to this subject will be found in his additions to the third ed. of Challis, Real Property, and in the sixth ed. of Jarman, Wills; and also in the following essays: Perpetuities, L.Q.R. xv 71; the Rule in Whitby v. Mitchell, L.Q.R. xxv 385; Some Recent Decisions on the Rule against Perpetuities, L.Q.R. xxvii 150; Limitations of Land to unborn Generations, L.Q.R. xxix 304; Remoteness of Terms and Powers, L.Q.R. xxx at pp. 74-76; Double Possibilities, L.Q.R. xxx 353; Restraints on Alienation, L.Q.R. xxxiii 236, 342; Contingent Remainders and Other Possibilities, Yale Law Journal xxvii 977.

[2] The Rule against Perpetuities (2nd ed.); see also Whitby v. Mitchell Once More, L.Q.R. xxix 26; for some account of Gray's work see Mr. Sweet's obituary notice, L.Q.R. xxxi 338.

[3] Real Property (22nd ed.) 413-414; on the history of the rule reference should also be made to an article by Mr. T. Cyprian Williams on Contingent Remainders and the Rule against Perpetuities, L.Q.R. xiv 234.

must necessarily arise within the compass of existing lives and twenty-one years after, with the possible addition of the period of gestation, in the case of some person entitled being a posthumous child. But if no lives are fixed on, then the term of twenty-one years only is allowed. And every executory estate which might in any event transgress the limits so fixed, will from its commencement be absolutely void." It will be clear that this is a rule which is very different in its character from the older rules which we have just discussed. Let us look at a few of the salient points of difference.

Both the older rules and the modern rule aim at the prevention of "the tying up of property, the taking of it out of commerce."[1] But, while the older rules effect this object by prohibiting both restraints on alienation and the creation of interests which will vest at too remote a period,[2] the modern rule effects this object by the latter expedient only. The older rules apply to interests in land which take effect as remainders, or are intended to evade the rules as to remainders:[3] the modern rule arose because many other kinds of interests both in realty and personalty had come to be recognized, which could not take effect as remainders, and to which the older rules were not applicable.[4] The older rules depended on many different common law doctrines—the rules which made contingent remainders destructible, rules as to the abeyance of the seisin, rules as to the impossibility of creating an unbarrable entail or a perpetual freehold:[5] the modern rule depends upon a series of comparatively modern cases, which have gradually fixed the utmost limit of time within which an interest can be made to vest.[6] The older rules are essentially common law rules, which have been accepted and applied also by equity in respect of the interests to which they relate: the modern rule was called into existence by the manner in which first equity, and then the common law in consequence of the action of equity, had come to treat interests which could not take effect as remainders; and a decision of the court of Chancery, given in opposition to the opinions of the chiefs of the three common law courts, settled its essential character.[7] For, though the common law judges helped to solve the problem how to frustrate the creation of perpetuities by means of these new interests;[8] and though common law analogies, drawn from the older rules, helped in the final ascertainment of the period fixed upon;[9] it was a lord chan-

[1] Gray, Perpetuities 92—"The tying up of property, the taking of it out of commerce, can be accomplished either, first, by restraining the alienation of interests in it or, secondly, by postponing to a remote period the creation of future interests."

[2] Above 204-212. [3] Above 208-211. [4] Above 130-132.
[5] Above 204-212. [6] Below 223-227. [7] Below 223-224.
[8] Below 217-223. [9] Below 221.

cellor, whose outlook was naturally less fettered by the older rules than the outlook of the common law judges, who was able to enunciate so clearly and finally the principle upon which the modern rule rests, that it has been accepted by law and equity alike.[1]

In dealing with the history of the modern rule I shall consider, firstly, its origins; secondly, the ascertainment of its underlying principle; and, thirdly, the settlement of its modern form.

(1) *Origins.*

The decisions in *Manning's Case* (1609),[2] and *Lampet's Case* (1612),[3] had, as we have seen, finally settled that executory devises of terms were not only valid but indestructible;[4] and the decision in *Pells v. Brown* (1620)[5] had settled that executory interests in freeholds, other than those taking effect as contingent remainders, were likewise indestructible. It was these decisions which showed that the older rules against perpetuities were no longer sufficient, and set the courts to work to search for another rule to meet this new danger.

The courts were not long in waking up to the existence of this danger. We have seen that the decisions in *Manning's* and *Lampet's Cases* had not been reached without a struggle; and it is clear that, throughout the seventeenth century, many judges regretted them, and, on that account, interpreted them as narrowly as possible. Thus, in 1618, "all the judges of the Common Pleas, viz. Hobart, Winch, Hutton, and Jones, and all the Barons (except Tanfield, Chief Baron) . . . said, that the first grant or devise of a term made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed by the alienation of the first party; and if it were now first disputed, it would be hard to maintain; but being so oft adjudged, they would not now dispute it."[6] Similarly, in 1661, Hyde, Twisden, and Browne, JJ., said, "though we do not hold it fit to call in question the judgment in *Matthew Manning's Case*, yet we do not think it safe to stretch the law against the ordinary rules of law further than in that case it is done."[7] In the case of *Pells v. Brown*[8] Dodderidge, J., dissented, on the ground that the removal of the destructibility of these executory devises took away the principal safeguard against the creation of a perpetuity by their means. He therefore held that Brown "had but a possibility to have a fee, and

[1] Below 223-225. [2] 8 Co. Rep. 94b. [3] 10 Co. Rep. 45b.
[4] Above 130-132. [5] Cro. Jac. 590; above 133-134.
[6] Child v. Baylie (1618) Cro. Jac. at p. 461.
[7] Pearse v. Reeve (1661) Pollex. at p. 30. [8] (1620) Cro. Jac. 590.

quasi a contingent estate, which is destroyed by this recovery before it came *in esse*, for otherwise it would be a mischievous kind of perpetuity which could not by any means be destroyed."[1] Later in the century, many judges, faced by the problems raised by these indestructible executory interests, were often inclined to subscribe to Dodderidge's views.[2]

The decision in *Pells v. Brown* showed that the problem of creating a new rule, to prevent the creation of a perpetuity, was not confined merely to creating a rule applicable to executory devises of terms. It showed that such a rule must be a general rule, applicable to all kinds of executory interests. This fact has been very clearly pointed out by Gray. He has very truly said that, if the decision in *Pells v. Brown* had been otherwise, and these executory interests had been held to be destructible like contingent remainders, "the need of a rule against remoteness might never have been felt"; and that "even if some such rule had finally been evolved, it would probably have been in other than its present form."[3] For the same reason it would also be true to say that, if the projected bill of 1597[4] had ever become law, it would probably have had a similar effect in preventing the growth of the modern rule. It was then proposed to enact that "all lymitacions by uses or wills made . . . for any manner of restrayninge of any person or persons that hath or shall have any estate of inheritance in any lands tenements or hereditaments from sellinge devisinge or assuringe the same . . . shalbe utterlie void"; and that the persons entitled to such estates of inheritance should enjoy them discharged of such restraint. Clearly this clause would have had, and was probably intended to have, an effect similar to, but more severe than, the effect which would have been produced by a contrary decision in *Pells v. Brown*. It would not only have rendered destructible, it would actually have destroyed these executory interests after an estate of inheritance; for the decision in *Pells v. Brown* showed clearly that the executory interest there held to be indestructible, did operate as a

[1] Cro. Jac. at p. 592; and see his quaint remarks on this subject more at length in 2 Rolle Rep. at p. 221—"Si homes poient faire continuance de terre in lour families for ever, ceo fuit a preventer le providence de Dieu, who sets up and pulls down come a luy pleist a son pleasure, Thou fool, this night shall thy soul be taken from thee. . . .; mes si perpetuities serront establish ceo voilt prevent tout le power del disposition del terres per le Dieu"; cp. Lord Nottingham's remarks, above 208-209.

[2] "These executory devises had not long been countenanced when the judges repented them; and if it were to be done again, it would never prevail; and therefore there are bounds set to them viz. a life or lives in living; and further they shall never go, by my consent at law, let Chancery do as they please," Scattergood v. Edge (1700) 12 Mod. at p. 287 *per* Treby, C.J.; cp. the remarks of Powell, J., ibid at p. 281; and see Gray, op. cit. 128 n. 2 for the remarks attributed to Rolle, C.J., and to Latch *arg.* in Lay v. Lay (1651) Style 258, 274.

[3] Op. cit. 128.

[4] Above 198, 214; App. II.

restraint on alienation. But, in spite of the severity of this proposed enactment, it would have been quite inadequate as a general measure for restraining the creation of interests designed to vest at a remote date in the future; for it did not touch executory interests created out of terms of years. Therefore, as I have already pointed out, it was just as well that it never became law.[1]

It was executory devises of terms of years which had been the first kind of executory interests to be recognized as indestructible; and so it is not surprising that it was in connection with them that we get the earliest attempts to evolve some new rule to prevent perpetuities. It would seem from one of the reports of the case of *Tatton v. Mollineux* (1610),[2] that some thought that, if a term were entailed, the first donee in tail or for life, i.e., lives in being, could be restrained from alienating to the prejudice of the remainderman; but that no one else could be so restrained, since such restraint would in effect create a perpetuity, i.e. an unbarrable entail. Moreover, in 1612, the same year as *Manning's Case* was decided, it was held in the case of *Retherick v. Chappel*[3] that an executory bequest of a term to A so long as he should have issue of his body, and after his death without issue to B, was good. It was soon seen, however, that to allow an executory bequest to take effect at a date, which might possibly be very remote, was a direct encouragement to the creation of a perpetuity. *Retherick v. Chappel* was not followed; and it appeared from the case of *Child v. Baylie*[4] that the judges, though bound by *Manning's Case* to allow the validity of an executory bequest after a life estate,[5] refused to go beyond that decision. In the case of *Child v. Baylie* (1618), a testator devised a term of years to his wife for life, and to William his eldest son and his assigns; but, if William died without issue living at the time of his death, to his son Thomas. The bequest to Thomas was held to be void.[6] "It is all one," said the court,[7] "as the devise of a term to one and the heirs of his body, and if he die without issue, that then it shall remain to another, it is merely void; for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a term."

It is clear from this case, and from the case of *Leventhorpe v.*

[1] Above 214.
[2] Moore 809-810; above 208 n. 2.
[3] (1612) 2 Bulstr. 28.
[4] (1618) Cro. Jac. 459.
[5] Above 218 n. 2.
[6] There was considerable discussion in the Duke of Norfolk's Case (1682) 3 Ch. Cas. at pp. 34-35 as to the form of the limitation in Child v. Baylie; Lord Nottingham said that he had seen a copy of the record, and vouches for the correctness of Croke's report; cp. Gray, op. cit. 124 n. 2.
[7] Cro. Jac. at p. 461.

Ashbie,[1] that the court looked at the nature of the precedent estate; and, if they found that it was a greater estate than an estate for life, they condemned all the subsequent limitations. They regarded them as being in effect limitations designed to create an unbarrable entail,[2] and therefore void as creating a perpetuity in the sense in which Lord Nottingham defined that term.[3] This view was taken in a series of cases in the seventeenth century.[4] On the other hand, if the precedent estate was only an estate for life, the subsequent limitation was held to be good;[5] and it was held by some of the judges to be good, even though it was made in favour of a child of the first taker who was unborn at the death of the testator.[6] There was, however, considerable hesitation as to the validity of such executory bequests to unborn children;[7] but, at the latter part of the seventeenth century, opinion was inclining to the view that an executory bequest of a term, or an executory devise of freehold, to the unborn children of the life tenant was good.[8] Moreover, at about the same period, the view was gaining ground that an executory devise after any number of lives in being was good; and in 1670 this was stated as settled

[1] (1635) 1 Rolle Ab. *Devise* L. pl. 1; above 208.

[2] As Hargrave said in his argument in the Thellusson case, Jurisconsult Exercitations iii 41, "There was not wanting the colour of reason to support the decision in this case of Child and Baily, for an unqualified executory devise of a term, after a devise to one and the heirs of his body, is on the contingency of a general failure of issue, and so leads to a palpable perpetuity; and as the judges, however wrongly, considered the case, the devise was constructively tantamount. In that point of view also, that is, as the devise of a term after a prior devise to one and the heirs of his body, Child and Baily was a proper reprobation of the executory devise of a term."

[3] Above 208-209.

[4] Saunders v. Cornish (1630) Cro. Car. 230—"to limit the remainder of a term after a dying without issue stands not with law"; Backhouse v. Bellingham (1666) Pollex. 33; Pearse v. Reeve (1661) Pollex. 29; Burges v. Burges (1674) ibid 40; Knight v. Knight ibid 42; see Gray, op. cit. 130 and n. 1; Wood v. Saunders (1669) Pollex. 35 is not, as Gray seems to think, an illustration of this principle; but rather an illustration of the very different principle established in the Duke of Norfolk's Case, that the question of the validity of the executory bequest depends, not on the nature of the precedent limitation, but on the time when it must vest, if it is to vest at all, below 222 and n. 4.

[5] Cotton v. Heath (1638) Pollex. 26; Goring v. Bickerstaffe (1662) ibid 31; Gray, op. cit. 131-132.

[6] Sackville v. Dobson (1638) 1 Ch. Cas. 33; Burges v. Burges (1674) 1 Mod. 115 *per* Finch, L.K.; Gray, op. cit. 132-133, 134.

[7] Cases denying their validity are Apprice v. Flower (1661) Pollex. 27; Pearse v. Reeve (1661) ibid 29; Goring v. Bickerstaffe (1662) ibid 31; Freeman Ch. at p. 166; Gray, op. cit. 132.

[8] Cases cited in n. 6; in Love v. Wyndham (1670) the remarks of Twisden, J., as reported 1 Sid. at p. 451, point in this direction—"Si devise soit al un pur vie que nest adonque in esse (come al primer fitz) la nul limitacion dun terme poet ouster ceo"; but his remarks as reported in 1 Mod. at p. 54 point in the other—"if you limit a remainder to a person not in being, as to the first begotten son etc., and the like, there would be no end if such limitations were admitted, and therefore they are void"; cp. Snow v. Cutler (1664) 1 Lev. 135, above 96-97; Gray, op. cit. 133, 134-135.

law by Twisden, J.[1] In laying down these rules the courts were no doubt influenced by the analogy of the rules applicable to contingent remainders.[2] It is clear that a contingent remainder could be well limited to an unborn person after any number of vested remainders to lives in being, and would take effect, if it was ready to vest when the last of the lives dropped. It was possibly the same analogy that induced the court to decide, in the case of *Taylor v. Biddall*[3] in 1678, that an executory devise to the heirs of a living person when they attained twenty-one was valid; for it is clear that, if a contingent remainder is limited to the heirs of of a living person, and an infant takes, he cannot alien till he is twenty-one; so that by such an executory devise the land is not tied up longer than it might be tied up if limited by way of contingent remainder.[4]

The analogies taken from the rules regulating the limitation of contingent remainders, obviously helped the courts to arrive at these conclusions as to the kinds of executory interests which they would hold to be valid. No doubt some of these rules were based on common law doctrines as to the abeyance of the seisin. But, as they did in fact prevent a contingent remainder from vesting at too remote a date, it was inevitable that, when analogies drawn from these rules came to be applied to a set of interests to which these common law doctrines were inapplicable, and when these analogies were applied for the purpose of preventing the creation of a perpetuity by their means, attention should gradually come to be concentrated on what was after all their underlying effect—the prevention of interests which might vest at too remote a date.

That it was the remoteness of the date at which an executory interest must vest upon which attention should be concentrated was stated clearly by Bridgman and Davenport, as early as 1618, in their unsuccessful argument in *Child v. Baylie*.[5] In that case the executory bequest in favour of Thomas was only to take effect if the bequest to William and his assigns failed, owing to William's death without issue *in the lifetime of Thomas*. Bridgman and Davenport urged that this really amounted to an executory

[1] "If a tenant of a term devise it to B for life, the remainder to C for life, the remainder to D for life; I have heard it questioned whether these remainders are good or not? but it hath been held that if all the remaindermen are living at the time of the devise, it is good: if all the candles be light at once it is good," Love v. Wyndham (1670) 1 Mod. at p. 54.

[2] Below n. 4.

[3] 2 Mod. 289; Gray, op. cit. 139-140.

[4] "In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age, the estate is unalienable. In conformity to that rule the courts have said, so far we will allow executory devises to be good," Long v. Blackall (1797) 7 T.R. at p. 102 *per* Lord Kenyon, C.J.

[5] Cro. Jac. 459; above 219.

bequest over after William's death; that consequently it was an executory bequest after a single life; and that therefore it was valid.[1] Bridgman continued to take this view of the law, in spite of the decision in *Child v. Baylie.* We shall see that the conveyance which he drew in 1647 for the Duke of Norfolk,[2] the validity of which was in issue in the *Duke of Norfolk's Case,* depended upon its correctness;[3] and in the case of *Wood v. Saunders* in 1669[4] he, as Lord Keeper, with the approbation of the judges whom he had called in to advise him, gave a decree in accordance with it. Naturally this case played a not inconsiderable part in the arguments in the *Duke of Norfolk's Case,* in which the view, which he had thus continued to hold, was finally established.[5]

But, till the decision of the *Duke of Norfolk's Case,* the decision in the case of *Wood v. Saunders* stood alone. The common law judges stood by their decision in *Child v. Baylie;* for, though they were quite well aware that it was remoteness of vesting which must be guarded against,[6] and though the cases which came before the courts made this fact increasingly obvious, they could not wholly clear their minds from ideas which were derived from a consideration of the nature of the precedent vested estate. If a limitation was to A and his assigns, or to A and the heirs of his body, that was in substance an estate tail, and being

[1] Cro. Jac. at p. 460; Gray, op. cit. 126-127.

[2] "These indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them my Lord Keeper Bridgman's Clerks; I knew them to be so. This attestation of these deeds is a demonstration to me they were drawn by Sir Orlando Bridgman," the Duke of Norfolk's Case (1682) 3 Ch. Cas. at p. 27.

[3] Below 223-224.

[4] 1 Ch. Cas. 131; S. C. Pollex. 35; the former report thus states the principle there laid down: "that when the trust of a term is to one for life, the remainder for life, the remainder to a third person, John, for the whole term (if he outlive the tenants for life), the remainder to another (Edward) . . . that the remainder to the third person viz. John . . . being merely contingent, was not so vested in him, as that his executors could have it, he dying before his father and mother (the two tenants for life); and that . . . he dying in the life of tenant for life . . . the remainder over to Edward . . . was well limited"; as Lord Nottingham pointed out in the Duke of Norfolk's Case (1682) 3 Ch. Cas. at p. 36, it was in substance held that "the whole term had vested in John, if he had survived; yet the contingency never happening, and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it"; and he added, "thus we see that the same opinion which Sir Orlando Bridgman held when he was a practiser, and drew these conveyances, upon which the question now ariseth, remained with him, when he was judge in this court and kept the seals."

[5] Gray says, op. cit. 126, that Davenport "was the first person to enunciate clearly the principle on which the rule against perpetuities rests"; but in Croke's report the argument is represented to be the argument both of Bridgman and Davenport; and it will be clear from the text that Bridgman had a good deal more to do than Davenport with the eventual establishment of the principle for which he and Davenport then unsuccessfully contended.

[6] See the remarks in Leventhorpe v. Ashbie (1635) 1 Rolle Ab. *Devise* L. pl. 1, cited above 208 n. 5.

limited out of a term was an unbarrable estate tail. A must therefore take the whole term if the danger of a perpetuity was to be avoided; and any limitation over must be held to be bad. The common law judges could not see that, if the limitation could only take effect, if at all, at A's death, the danger of remoteness was avoided. In fact their minds were confused by competing analogies. Though the analogies drawn from the rules as to the limitation of contingent remainders helped them to come to a decision as to what kinds of executory interests were void on the ground of remoteness; the analogies drawn from the law as to the nature of estates at common law made them unable to appreciate the fact that, it was not so much the nature of the precedent estate that mattered, as the time at which the executory interest must vest. Thus the principle that it was the remoteness of the date at which the executory interest was made to vest, which was the sole criterion of the question whether or not it should be held to be valid, was obscured; and, but for Lord Nottingham's eloquent and conclusive judgment in the *Duke of Norfolk's Case*, this truth might never have clearly emerged. Lord Nottingham, being not only a learned lawyer but also a legal statesman,[1] was eminently fitted to give effect to the underlying principle of the many similar yet divergent decisions to which this question of mixed law and policy had given rise. He applied to the solution of this question all his great gifts of law and statesmanship; and, as we shall now see, he stated that principle so clearly that, in spite of the dissent of the common law judges and of his successor, it commanded the assent of the House of Lords and of all the lawyers of future ages.[2] In his judgment we get the first authoritative statement of the principle underlying the modern rule against perpetuities.

(2) *The underlying principle of the modern Rule against Perpetuities.*

The following were the essential facts of the *Duke of Norfolk's Case*:[3] the earl of Arundel conveyed land to trustees for a term of 200 years on trust for Henry Howard, his second son, and the heirs male of his body; but if Thomas Howard, his eldest son, died without issue male in Henry Howard's lifetime, or if the earldom should descend upon Henry Howard, the land was to

[1] See vol. vi 540-541 for an account of Lord Nottingham.

[2] "It is sufficient to refer to the *Duke of Norfolk's Case*, in which all the learning on this head was gone into; and from that time to the present, every Judge has acquiesced in that decision," Long v. Blackall (1797) 7 T.R. at p. 102 *per* Lord Kenyon, C.J.

[3] 3 Ch. Cas. 1; 2 Ch. Rep. 229; 2 Swanst. 454; Pollex. 223; see Gray, op. cit. 136-138.

be held on trust for Charles Howard, his third son. In 1675 Henry Howard got the term assigned to himself, and suffered a recovery to the use of himself and his heirs. In 1677 Thomas Howard died without issue. The question therefore arose whether the executory trust in favour of Charles Howard was barred by this recovery. Since the assignment of the term to Henry Howard was made with notice of the trust, the assignment and the recovery could be disregarded if the executory trust in favour of Charles was valid. Obviously its validity depended on the question whether or not it was too remote. In 1682 Lord Nottingham, contrary to the opinion of Pemberton and North, C.JJ., and Montague, C.B., whom he had called in to advise him, held that the trust was not too remote, and made a decree in favour of Charles Howard. In 1683, on a bill of review, his successor lord keeper North reversed this decision; but in 1685 Lord Nottingham's decree was restored by the House of Lords.[1]

Lord Nottingham's judgment in this case is one of his happiest efforts. It contains a most valuable history of the law of executory interests both of freeholds and of terms of years; and a very clear summary of the results arrived at by the numerous cases on the subject. The whole of this learning is made to prove and to illustrate his main thesis, namely that the time at which the executory interest must vest is the sole point to be regarded; and that, if it must vest, if at all, after a life in being, it is good, irrespective of the nature of the estate by which it is preceded. He shows that, though this is contrary to the decision in *Child v. Baylie*, it is in accordance with the decision in *Wood v. Saunders*, and in accordance with the principle underlying the case of *Pells v. Brown*,[2] and ordinary conveyancing practice.[3] Finally he shows the absurdity of supposing that such a limitation as that in the case before the court, which must take effect, if at all, within a life in being, could tend to a perpetuity. It had actually been admitted by Pemberton, C.J., that, if the term held in trust for Henry Howard had been directed to cease on the death of Thomas Howard, and it had

[1] Williams, Holt, and Yate appeared for the appellant; and Pollexfen, Rawlinson, and Hutchins for the respondent, Hist. MSS. Com. 11th Rep. App. Pt. II. 300.

[2] 3 Ch. Cas. at pp. 31-32; ibid at p. 50.

[3] "Shall not a man have as much power over his lease as he has over his inheritance? . . . A man that hath no estate but what consists in a lease for years, being to marry his son, settled this lease thus: in trust for himself in tail, till the marriage take effect; and if the marriage take effect while he lives, then in trust for the married couple; is this future limitation to the married couple good or bad? If any man says it is void, he overthrows I know not how many marriage settlements: if he say it is good, why is it not a future estate in this case as good as in that, when there is no tendency to a perpetuity, no visible inconvenience?," ibid at pp. 49-50.

been directed that a new term should then arise in favour of Charles, this limitation would have been good. It followed, therefore, that the trust in favour of Charles could not be regarded as a perpetuity; and, if the trust limited as it was limited in the present case was held to be bad, it would be held to be bad on a technical ground backed by no substantial reason whatever. "Pray let us so resolve cases here, that they may stand with the reason of mankind when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference why I may not raise a new springing trust upon the same term, as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the Christian world."[1]

This case thus laid down the root principle of the modern rule against perpetuities—the validity of an executory interest depends upon the remoteness of the date at which it is limited to vest. It also clearly lays down the principle, which was assumed in the earlier cases on executory interests, that, in considering the validity of a limitation, possible and not actual events must be considered. "If a term be limited to a man for life, with contingent remainders to his first, second, third, and tenth son in tail, remainder over, though the contingencies never happen, yet the remainder [over] shall never take place, for the mere intention to create a perpetuity made all void."[2] Obviously exactly the same principle is applicable to those older rules which prevented the creation of an unbarrable entail or a perpetual freehold. Such limitations are bad *ab initio*, quite regardless of actual events, which in fact cause a subsequent limitation to vest within a life in being.[3] On the other hand, this principle is not applicable to the older rule, which required a legal contingent remainder to vest at or before the termination of the precedent estate of freehold; for the question whether this rule has been complied with can only be answered by reference to the actual event.[4] We shall see that it is this difference, arising from the nature of this last named rule, which at the present day underlies the leading difference between the treatment of legal contingent remainders and the treatment of other future interests in property.[5]

This case did not settle the question as to the utmost limit of time at which a future interest could be made to vest. It settled only that it was valid if limited to vest after a life or lives in being. The question whether it could be limited to vest at any more

[1] 3 Ch. Cas. at p. 33. [2] 2 Swanst. at p. 458.
[3] See Sweet, Contingent Remainders and other Possibilities, Yale Law Journal xxvii 979 seqq.
[4] Ibid. [5] Below 236.

remote date was deliberately left open.[1] The settlement of this question was the work of the eighteenth and the early nineteenth centuries.

(3) *The settlement of the modern form of the Rule.*

The first extension of the term within which an executory interest could be limited, was made in order to cover the case where the person to whom it was limited was a posthumous child or a minor.[2] We have seen that the case of *Taylor v. Biddall*[3] (1678) was an authority for the proposition that an executory devise to the heirs of a living person, when they attained twenty-one, was valid. This proposition would hardly have commended itself to Treby, C.J.; for in *Luddington v. Kime* (1697), differing from Powell, J., he doubted whether an executory devise to the posthumous son of a living person was valid.[4] In 1722 also, in the case of *Gore v. Gore*, the judges certified in accordance with the view of Treby, C.J.[5] But in 1734 Lord Hardwicke, when chief justice of the King's Bench, certified, in effect, that an executory devise to a posthumous child was good;[6] and in 1736, in the case of *Stephens v. Stephens*,[7] after an examination of the record in *Taylor v. Biddall*, he and the other judges held that an executory devise limited to grandchildren living at the testator's death, when they attained twenty-one, was valid. This case settled the validity of this extension.[8]

The second extension covered an analogous, but a by no means identical case. Suppose a devise to A for life, then to his eldest unborn son in fee, but, if such son dies under twenty-one, to X. Here vesting is suspended during a minority; but it differs from the first set of cases in that the minority is not that of the executory devisee. In 1685, in the case of *Massingberd v. Ash*, it was held that the devise to X was valid;[9] and in the case of *Staines v. Maddox*[10] in 1728 a similar limitation was held to be valid by the House of Lords.

This second extension of the period allowed by the rule probably had something to do with the third extension, which allowed a gross period of twenty-one years, irrespective of any minorities,

[1] "It hath been urged at the bar, Where will you stop if you do not stop at *Child and Bayley's* case? I answer, I will stop everywhere when any inconvenience appears, nowhere before. It is not yet resolved what are the utmost bounds of limiting a contingent fee on a fee; and it is not necessary to declare what are the utmost bounds to the springing trust of a term, for whensoever the bounds of reason or convenience are exceeded the law will quickly be known," 2 Swanst. at p. 468.

[2] Gray, op. cit. 138-143.

[3] 2 Mod. 289; above 221.

[4] 1 Ld. Raym. at p. 207.

[5] 2 Stra. 959; cp. Gray, op. cit. 141.

[6] 2 P. Wms. at p. 65.

[7] Cases temp. Talbot 228, at pp. 231-232.

[8] Gray, op. cit. 143.

[9] 2 Ch. Rep. 275; Gray, op. cit. 143-144.

[10] 3 Bro. P.C. 108.

after lives in being. The first step towards this extension was taken by the decision of the House of Lords in the case of *Lloyd v. Carew* (1697).[1] In that case there was a conveyance to A and his wife for their lives, remainder to their children in tail, remainder to A in fee, provided that, if at the death of the survivor of A and his wife no issue of their's were alive, and if the heirs of the wife within twelve months of such death without issue paid £4000 to the heirs of A, the estate should go to the heirs of the wife in fee. In this case, therefore, the executory devise might take effect one year after lives in being; and on that ground Lord Somers, Treby, C.J., and Rokeby, J., held it to be void.[2] But this decision was reversed by the House of Lords, who decided the case without the help of a single lawyer except the lord chancellor.[3] From this decision the conclusion was deduced that, if an executory interest was so limited that it vested within a reasonable time after lives in being, it was valid.[4] During the latter half of the eighteenth century, the opinion began to be expressed that this reasonable time should, by analogy to the utmost length to which a minority can extend, be a period of twenty-one years, with the addition, when necessary, of the period of gestation.[5] Possibly the growth of this idea was encouraged by the fact that it had, as we have seen, been decided that the period of minority allowed need not be the minority of the person to whom the executory interest was given. If this extension had not taken place the analogy might not have appeared so obvious. However that may be, the prevailing opinion at the end of the eighteenth century was in favour of allowing a gross term of twenty-one years.[6] But some judges still considered that, it was only if a minority in fact existed, that any additional period beyond lives in being should be allowed.[7] The doubt was set at rest by the decision of the House of Lords in 1832 in the case of *Cadell v. Palmer*. That case decided that a gross term of twenty-one years, without reference to any period of minority, might be taken, with the addition, when necessary, of the period of gestation.[8]

[1] Prec. Ch. 72; S.C. Shower, P.C., 137; Gray, op. cit. 144-145.
[2] Shower, P.C., at p. 138.
[3] Gray, op. cit. 145.
[4] Ibid 146, citing Marks v. Marks (1718) 10 Mod. 419.
[5] Gray, op. cit. 148-149, citing Goodtitle v. Wood (1740) Willes 211; Marlborough v. Godolphin (1759) 1 Eden 404; Goodman v. Goodright (1759) 2 Burr. 870; Long v. Blackall (1797) 7 T.R. 100; Thellusson v. Woodford (1799) 4 Ves. at p. 319. The last named case established the rule that, as a child in ventre sa mere is to be taken for all purposes as a life in being, the time of gestation is allowed when necessary, both at the beginning and end of the period of twenty-one years, 4 Ves. 334, 11 Ves. 150.
[6] Gray, op. cit. 149-152.
[7] Thus in Thellusson v. Woodford both Alvanley, M.R., 4 Ves. at p. 337, and Macdonald, C.B, 11 Ves. at p. 143, seemed to think that a term of twenty-one years without reference to a minority could not be taken, Gray, op. cit. 149-152.
[8] 1 Cl. and. Fin. 372.

Thus the modern form of the rule was settled, and settled by the courts without any interference on the part of the Legislature. The only legislative modification of the rule as thus established was made by the Conveyancing Act, 1882,[1] which enacts that, when a person is entitled to land for an estate in fee, or for an estate of years absolute or determinable on life, or for life, and there is an executory limitation over on default or failure of his issue, whether within any specified period of time or not, the executory limitation shall be or become void, so soon as any of the issue, on whose failure the limitation over was to take effect, have attained twenty-one.

In one respect, however, it was proved at the end of the eighteenth century that the rule was defective. Though it was a sufficient safeguard against the efforts of owners to prevent the alienation of property, it was not a sufficient safeguard against their efforts to prevent altogether the enjoyment of the property by those who would otherwise be the beneficiaries, through the operation of a trust for accumulation. As Hargrave pointed out,[2] "it is one thing to allow a period for the duration of an entail keeping property unalienable; it is another thing to allow a period for a trust making property unusable and unenjoyable" by the beneficiaries, till the term fixed for the accumulation has expired.[3] To the history of the way in which this defect has been remedied we must now turn.

The Rule Against Accumulations

Till the case of *Thellusson v. Woodford*[4]—a case which arose out of the will of Peter Thellusson who died in 1797—no attention had been paid to this distinction between a trust designed to prevent the free alienation of property, by the creation of a series of limited interests, which would prevent the vesting of the property in an absolute owner at too remote a date; and a trust for accumulation, designed to make the property "unusable and unenjoyable" by the persons who would otherwise have been entitled to use and enjoy it. It was assumed, and, as the result of this case showed, rightly assumed, that the same rule applied to both kinds of trust. The reason assigned by Hargrave for the

[1] 45, 46 Victoria c. 39 § 10. [2] Jurisconsult Exercitations iii 151.

[3] Such a trust, as was pointed out in Thellusson v. Woodford 4 Ves. at p. 318, and 11 Ves. at p. 147, does not make the property absolutely unusable; "The rents and profits," as Lord Eldon said, "are not to be locked up, and made no use of for the individuals or the public. The effect is only to invest them from time to time in land: so that the fund is not only in a constant course of accumulation, but also in a constant course of circulation"; Hargrave had got hold of the right distinction but he expressed himself too absolutely.

[4] (1797) 4 Ves. 227; S.C. on appeal 11 Ves. 112.

fact that the law had disregarded this distinction is no doubt correct. He pointed out[1] that these trusts for accumulation had "insensibly sprung up . . . under the *shelter of executory devise and trusts of the like nature.* Cases had occurred both for real and personal estate; not cases of trust of accumulations; but controverted cases of executory devise and testamentary trusts, without any express words to explain to whom the intermediate profits of the devised property should belong; and cases in which the great point was, whether the boundary line of executory devise was exceeded, and in which the point as to intermediate profits was merely incidental and secondary. These cases also arising on devises of *residuary* estate, the courts of equity were in some instances, and the courts of law, on reference to them from the former courts for opinion in others, were tempted by the comprehensive force of the words *residue* and *residuary*, to construe them, as carrying the intermediate profits to the executory devisee or legatee. In this way Chancery decided for itself in Chapman and Blissett[2] before Lord Talbot in 1735. In the same way Lord Hardwicke and the other judge of the King's Bench certified to Chancery in Stephens v. Stephens[3] in the following year. Thus, whilst the judges of both courts seemed to be chiefly settling the boundary of executory devise, and to be only incidentally deciding, that an *unborn* person was intended to be legatee of the intermediate profits instead of a *living* person, they in reality sanctioned a trust of accumulation; or rather they created it, for probably it was not thought of by the testator himself. I say that both courts in reality so sanctioned a trust of accumulation; because, if the intermediate profits were to go to the future devisee or legatee, they were necessarily to be saved and accumulated for him." The "casual and unguarded" manner in which these trusts had thus crept in was the basis of Hargrave's argument in the *Thellusson Case*, that the existing precedents were "not sufficient to preclude a judicial consideration of the legal objections to trusts of posthumous accumulation, when such an accumulation is the avowed object."[4]

It was the posthumous avarice of Peter Thellusson[5] which showed that considerations of public policy, as well as considerations of justice to near relatives, had made it necessary to restrain trusts for accumulation within a narrower time limit than that allowed by the rule against perpetuities. Peter Thellusson's real estate consisted of lands of the value of nearly £5000 a

[1] Jurisconsult Exercitations i 311-312. [2] Cases temp. Talbot 145.
[3] Ibid 228. [4] Jurisconsult Exercitations i 312.
[5] For some particulars as to his life and career see D.N.B; it appears that he was a merchant of French Huguenot extraction, who was naturalized in 1762.

year, and his personal estate amounted to over £600,000. He directed that the whole of this property should be accumulated during the lives of all his sons, grandsons, and grandsons' children, who were living at his death; and that, on the death of the survivor, the accumulated fund should be divided into three lots, and transferred to the three eldest male living descendants of his three sons in tail male. From the time that these persons became entitled to the property they were to use the name of Thellusson only. If the male issue of his three sons failed, the property was to go to the Crown to the use of the sinking fund, in such manner as should be directed by Act of Parliament. Naturally the sons of Peter Thellusson tried to dispute the legality of these dispositions; and Lord Loughborough admitted that the will was "so unkind and so illiberal," that it was "no breach of duty in them to endeavour to set it aside if they can by law." [1] But it was pointed out that neither the large amount of the property at stake, nor the "unmeritorious object" of the testator, could affect the rule of construction to be applied.[2] Therefore the lord chancellor and the master of the Rolls, in accordance with the opinion of Lawrence and Buller, JJ., whom they had called in to advise them, made a decree upholding the will; and that decree was upheld by the House of Lords.[3] Lord Eldon did not differ from Hargrave's account of the genesis of these trusts for accumulation; but both he and the judges in the court below considered that the precedents, in which accumulation had been directed, were decisive.[4] In fact no sensible distinction could be drawn between an accumulation directed by the court, and an accumulation created by a testator or settlor. In these circumstances it is quite clear that the decision arrived at was inevitable. The will stood, the accumulations proceeded, and, eventually, on the death of the last surviving grandson in 1856, the estate was divided (not without more litigation) between the two male representatives of the two of Peter Thellusson's sons who had left issue. But, owing to mismanagement and costs of litigation, the estate realized a comparatively small amount.[5] And so to this famous scheme we may apply the words which Coke used, in *Mary Portington's Case*, of other schemes of his own day—"these perpetuities were born under some unfortunate constellation."

Peter Thellusson was justly confident of the legality of his extraordinary testamentary dispositions; but he was much more apprehensive of the action which the Legislature might take in

[1] 4 Ves. at p. 340. [2] Ibid at pp. 329, 340. [3] 11 Ves. 112.
[4] Ibid at pp. 146-148. [5] D.N.B.

consequence of them;[1] and his apprehensions were justified. The result of the very thorough exposure of the impolicy of permitting such a trust for accumulations as he had created, was the passing in 1800 of the Act commonly known as the Thellusson Act.[2] That Act, together with the later Accumulations Act of 1892,[3] fixes certain short and definite periods within which trusts for accumulation are permitted. These two Acts therefore establish new and separate rules for trusts of this kind.

The Relation Between These Various Rules

The rules against accumulations are thus comparatively modern rules of statutory origin, applicable to trusts of a particular kind, and designed to prevent the owners of property from rendering their property inalienable for a purpose which the Thellusson case showed to be particularly objectionable. No serious question or difficulty has arisen as to their relation to the rules against perpetuities. It was held, very shortly after the passing of the Thellusson Act, that, though a direction to accumulate which violates the rule against perpetuities is wholly void, a direction, which does not violate this rule, but does violate the Act, is void only for the excess.[4] It is far otherwise with respect to the relations between the older rules and the modern rule against perpetuities. This question has given rise to some very difficult questions of law, which the history of these rules, if it cannot claim to solve them, at least helps us to understand.

At the outset, it is as well to remember that, throughout their history, there has been a close connection between the older and the modern rules. Both the older rules and the modern rule are judge-made law. The older rules are, it is true, essentially common law rules; while the modern rule, both in its origin and its development, owes as much, and perhaps more, to equity than to the common law. But judges of the courts of law and equity have worked together at the task of shaping and applying both sets of rules; and, therefore, as we might expect, both sets of rules have had a reciprocal influence upon one another.

[1] The following clause occurred at the end of his will:—"As I have earned the fortune which I now possess with industry and honesty, I trust and hope that the legislature will not in any manner alter my will or the limitations thereby created, but permit my property to go in the manner in which I hereby dispose of it," 4 Ves. at p. 235.

[2] 39, 40 George III. c. 98.

[3] 55, 56 Victoria c. 58; for the provisions of these Acts see Challis, Real Property (3rd ed.) 200-205; Williams, Real Property (22nd ed.) 415-416; Gray, op. cit. 514-515.

[4] Griffiths v. Vere (1803) 9 Ves. 127; Marshall v. Holloway (1820) 2 Swanst. at p. 450.

The older rules dictated the form of a strict settlement; and obviously the length of time for which land so settled can be rendered inalienable—the life of the tenant for life and the minority of the tenant in tail—has suggested the period beyond which the modern rule holds a limitation to be void for remoteness.[1] But, though the older rules had a large influence on the modern rule in its earlier stages, in recent times it is the modern rule which has had a larger if a more indirect influence on the older rules. We have seen that, when the Legislature wished to modify the rule that a contingent remainder failed if it was not ready to vest at or before the termination of the precedent estate, it modified it only in favour of those contingent remainders which complied with the modern rule.[2] Similarly, the difficult question whether a contingent remainder limited to take effect after a contingent remainder offended the older rules, was solved by the courts in much the same way; for, as we have seen, they decided that in such a case the second contingent remainder failed, unless it necessarily vested within the period allowed by the modern rule.[3]

It is not difficult to see why the modern rule has thus been allowed to influence the application of the older rules. It is a clear general rule resting upon an intelligible principle, and applicable to many kinds of interests in property real and personal, and to powers over such property. The older rules, on the other hand, have a comparatively limited application; and, though they effect the same results as the modern rule, they rest historically upon different principles. Modern judges, therefore, have naturally wished to give as wide an application as possible to the modern rule. But, in extending its application, they have been met with two main difficulties. Firstly, to settle its relation to certain common law limitations, which were known long before the modern rule made its appearance, and to which the older rules do not apply; and, secondly, to settle its relation to the older rules, and to the interests to which these older rules apply.

(1) The first difficulty raises the question whether the modern rule applies to common law conditions and rights of re-entry. It is quite clear that, when both Littleton and Coke wrote, such conditions and rights of re-entry imposed by a grantor were exercisable by the grantor or his heirs at any distance of time in the future.[4] Probably the law was the same at the beginning of the nineteenth century; for the Real Property Commissioners stated that "the time allowed for re-entries under conditions broken, and for grants of rent charges, or other incorporeal

[1] Above 225-227. [2] Above 116, 204-205. [3] Above 214.
[4] Litt. §§ 325, 327; Co. Litt. 201, 203; Havergill v. Hare (1619) Cro. Jac. 510.

hereditaments, commencing in futuro, and for creating the *interesse termini*, was indefinite, however courts of justice may at present be disposed to consider them within that policy of the law which restrains perpetuities."[1]

With respect to rights of entry for breach of condition, the Real Property Commissioners considered that, though they were not subject to the modern rule against perpetuities, they were within its policy; and they proposed that they should be included within it.[2] Gray considers that the only two reasons which can be assigned for excluding them from the operation of the rule, are that they are common law interests, and that they can be released.[3] As these reasons are not sufficient, he concludes that these conditions are or should be subject to the rule. But these are not the reasons given by those who deny that they are subject to the rule. Their reasons are that they were not subject either to the modern rule, or to any other similar rule in the seventeenth century; that no authority, either judicial or legislative, can be pointed to, which subjects them to any such rule; and that therefore to subject them to it by judicial decision would be in effect to make a change in the law without legislative authority.[4] Gray's argument is no answer to these reasons. But another answer has been given which may be summarized as follows: There are one or two dicta in the text-books of the nineteenth century,[5] and in cases of the latter half of that century,[6] to the effect that these rights of entry for breach of condition are subject to the modern rule. Though these dicta are clearly contrary to the seventeenth-century authorities, though no authority legislative or judicial can be pointed to over-ruling these authorities, yet, in spite of them, the rule should be applied to these conditions, because it embodies a principle of the common law that perpetuities must be restrained, which principle should be applied as and when it is required. It can therefore be applied, not only to novel methods of limiting property, but also to old methods in existence before it was invented, if and when it is necessary to apply it. It was on these grounds that the rule was applied by Byrne, J., to these conditions in 1899.[7] If we consider the manner in which the common law has favoured freedom of alienation from the earliest days of its history, and has suppressed attempts which seemed likely directly or indirectly to fetter that freedom; if we consider the manner in which the modern rule has been applied in the eighteenth and

[1] Third Report 29. [2] Ibid 36. [3] Perpetuities 270-271.
[4] Challis, Real Property (3rd ed.) 207-213.
[5] Lewis, Perpetuities (ed. 1843) 616, cited L.Q.R. xvii 35; Sanders, Uses 207.
[6] Re McLeay (1875) L.R. 20 Eq. at p. 190; Dunn v. Flood (1884) 25 C.D. 629; S.C. 28 C.D. at p. 592.
[7] Re The Trustees of Hollis' Hospital [1899] 2 Ch. 540.

nineteenth centuries to restrain generally the creation of perpetuities in all sorts of property; and if, with the Real Property Commissioners, we recognize the expediency of applying this general rule to these conditions; we must, I think, admit that the extension of the rule to these conditions is as legitimate as the original creation of the rule, and the later developments of the sphere of its application.

With respect to rights of re-entry for non-payment of a rent charge the matter is considerably more doubtful. The Real Property Commissioners considered that these rights should not be included within the rule.[1] They were treated by the Commissioners and by Lewis as "part of the estate of the grantee in the rent";[2] and, in spite of dicta which point the other way, it would seem that there is considerable force in the argument that they are in effect vested interests to which the rule cannot apply.[3]

(2) The second question—the relation of the modern rule to the older rules, and to the interests to which these older rules apply—is very much more difficult. It is not a question of applying the modern rule to a set of interests, older than the modern rule, to which neither this nor any other similar rule has ever before been applied. Rather, it is a problem which involves two questions: Firstly, how far (if at all) has the growth and expansion of this modern rule affected a set of interests to which older rules, some of which were designed to effect an object similar to the modern rule, are applicable? Secondly, how far (if at all) has the modern rule affected these older rules?

In the nineteenth century this question was argued, not in the form in which I have just stated it, but in the form of an inquiry as to whether or not legal contingent remainders were subject to the modern rule against perpetuities.[4] Those who contended that they were not subject to the modern rule, argued that contingent remainders were much older interests than springing and shifting uses, executory devises, and other future equitable estates;[5] that the rules regulating the limitation of contingent remainders, and their liability to destruction, were quite sufficient to prevent the creation of a perpetuity by their means; that it was the fact that these executory interests had been held to be indestructible in *Manning's* and *Lampet's Cases* and in *Pells v. Brown* which was the cause for the formulation of the modern rule;[6] that distinguished authorities had denied that the rule applied to legal contingent remainders;[7] and that therefore, in the

[1] Third Report 37.
[2] Lewis, Perpetuities (ed. 1843) 618-619.
[3] See generally A. J. Mackey's article on this subject L.Q.R. xvii 32.
[4] For the earlier authorities see Sweet, Perpetuities L.Q.R. xv 71.
[5] Challis, Real Property (3rd ed.) 197.
[6] Ibid 216-217.
[7] Ibid; L.Q.R. xv 84-85.

words of Mr. Sweet, "any judge who now decides that legal contingent remainders are subject to the modern Rule against Perpetuities can only do so by ignoring the doctrines of the common law, the clear history of the rule, and the opinion of the most eminent real property lawyers of the last two generations."[1] Those who contended that they were subject to the modern rule denied that contingent remainders were much older than shifting and springing uses and executory devises; that, though originally destructible, they are not now destructible; that the only other rule which restrained the creation of a perpetuity by the limitation of successive contingent remainders was the rule that you cannot limit a possibility on a possibility, which is "a non-existent rule based on an exploded theory"; and that the modern rule, being "created to effect a general end of public policy, there is no reason in history or policy why all future interests should not fall within it."[2]

Neither of these opposing arguments can be fully supported. It is not true that contingent remainders are much older than springing and shifting uses and executory devises—in fact, all these future interests came into general use about the same period.[3] It is true that contingent remainders ceased to be destructible during the latter part of the seventeenth century, when the device of trustees to preserve contingent remainders was held to be efficacious for that purpose.[4] On the other hand, it is not true that the only rule which restrained the creation of a perpetuity by the limitation of successive contingent remainders, was the rule that you cannot limit a possibility on a possibility. That rule was a mere generalization of a loose and somewhat fantastic kind, which was erroneously supposed to be a justification, firstly for the now discarded rule that the contingency upon which a remainder is limited must not be too remote,[5] and secondly for the existing rule, which dates back to the sixteenth century, that after a contingent remainder to an unborn person for life, you cannot limit a second contingent remainder to that unborn person's children.[6] Besides this existing rule, which obviously prevents the creation of contingent remainders limited to vest at too remote a date, the rule which required a contingent remainder to vest either at or before the expiration of the precedent estate, and the rule which declared to be void all attempts to create an unbarrable estate tail, had similar effects.[7]

In fact, the question stated in the form of an enquiry whether a legal contingent remainder was or was not subject to the

[1] Challis, Real Property (3rd ed.) 217.
[2] Gray, op. cit. 256-260, 262-264.
[3] Vol. iii 134-136; vol. iv 441 n. 3; above 82-83.
[4] Above 111-114.
[5] Above 91-99.
[6] Above 100-101, 209-214.
[7] Above 84-85, 205-209.

modern rule against perpetuities, admitted of infinite argument, and led to no certain results. I think that if we put the question in another form, in a form which is suggested by the results which the most recent historical research into this subject suggests, and ask what is the relation of the older rules to the modern rule against perpetuities, we are more likely to attain some definite result.

The older rules operated, as we have seen, in three ways: Firstly, they made the creation of an unbarrable entail impossible. Therefore a contingent remainder limited after an estate tail can never be too remote. Secondly, they made it impossible, after an estate to an unborn person for life, to create a second contingent remainder in favour of that unborn person's children. These two rules apply to all contingent remainders legal as well as equitable, and whether created by act inter vivos or by will; and to all limitations which attempt to create these results by indirect methods.[1] Thirdly, these rules made it necessary that a contingent remainder should vest either at or before the expiration of the precedent estate. It is true that the Contingent Remainders Act of 1877 has saved a contingent remainder which is not thus ready to vest at the expiration of the precedent estate—but only provided that it is capable of vesting within the period allowed by the modern rule.[2] It is true that there might be some question as to the validity of a contingent remainder, limited to take effect after a contingent remainder, which did not contravene the second of these rules; but this question has been solved, and wisely solved, by making compliance with the modern rule a condition of the validity of the second contingent remainder.[3] This being the state of the law, it will be seen that there is no reason to make any further or other application of the modern rule to legal contingent remainders; for they are in fact restrained by the older rules even more strictly than they would be restrained by the modern rule. The only instance in which they are favoured arises from the fact that, in considering whether a contingent remainder fails by reason of abeyance of the seisin, you must look, not at possible, but at actual events.[4] Thus, if an estate is limited to A for life, remainder to his unborn child at any age over twenty-one, this limitation would be void in its inception if limited in any other way than by way of legal contingent remainder; but, if limited by way of legal contingent remainder, it will take effect if the child reaches the required age at or before the expiration of the precedent estate—that is within a life in being.

[1] Above 205-209, 209-211.
[2] Above 115-116, 204-205.
[3] Above 214.
[4] Above 225.

The binding force of the older rules has not been in any way affected by the rise of the modern rule;[1] and, in the cases to which these rules apply, they generally preclude the necessity for the application of the modern rule; for they ensure that a contingent remainder can never vest at too remote a date. This would seem to be the result of the modern cases; and it is, so it seems to me, a deduction from the older authorities which is historically correct. The result is that we have, firstly, one rule —the rule requiring that a contingent remainder must vest at or before the expiration of the precedent estate—applicable only to such legal contingent remainders as infringe the modern rule. Secondly, we have two other rules—the rules against the creation of an unbarrable estate tail and a perpetual freehold—which will be applied to any set of future interests in land which have the obvious result of infringing them; and from the latter of these two rules it follows that, after an estate for life to an unborn person, a contingent remainder (legal or equitable) to that unborn person's children is invalid. Thirdly, we have the modern rule against perpetuities, which applies generally to all future limitations of any kind of property including equitable contingent remainders, and to legal contingent remainders limited after legal contingent remainders, but not to legal contingent remainders limited after a vested estate. Fourthly, there are the statutory rules against accumulations.

We have seen that it was on the whole fortunate for the development of the law that the attempt to deal with the problem of perpetuities by legislation in 1597 proved to be abortive.[2] The rules both of law and equity, as to the conditions under which future interests in land could be created, were not then sufficiently definite; and the problem of the creation of future interests in personalty had not yet arisen. A statute like that proposed in 1597 would have hindered the development of the law as to the creation of future interests in freeholds; and it would have been quite inadequate, as it did not touch the problem of the limitation of future interests in terms of years or in chattels personal. But, in any body of law which is developed through decided cases, there comes a time when the principles underlying the cases have been so fully worked out that a restatement of the law is desirable; and such a restatement is doubly desirable when these principles are divergent in their character, and traceable historically to different sources; for in such a case they give rise to a body of rules, the complexity of which, though it can be explained historically, cannot be justified. It was obvious to the

[1] Above 216-217. [2] Above 218-219.

Real Property Commissioners that the time for such a restatement had come at the beginning of the nineteenth century; and they made a series of suggestions as to the form which such a restatement should take. But their suggestions bore no fruit. Recent legislation has, however, solved these problems. It has, in effect, restated this branch of the law of property, which is one of the most important of all its branches, because it defines the chief limitation upon that essential incident of the right of property—the right of the owner to dispose of it as he will.

I have now dealt with the powers of the landowner to regulate the devolution of his property, and the conditions under which he can exercise them. The law regulating this matter has been for the most part evolved by the needs and desires of the owners of great estates. The evolution of its principles has been connected to some extent with great principles of public policy; but, to a much larger extent, with the resolution of fine and often speculative problems of legal theory, which the desires of these landowners have set to the conveyancers and the courts. These landowners have in fact endowed the research needed to construct this body of legal theory; and thus, in this as in the mediæval period, it may be said that much of our modern land law is law made in the first instance to meet the needs of the great landowners. Naturally this body of law, being concerned with nice points of legal theory, is very remotely connected with the land itself—it is of the study, academic, rather than of the earth, earthy. But we must now descend from these heights, come nearer to the land itself, and say something of the evolution of the law which regulates the rights and duties of the persons who actually occupy it. With the development of some of the salient features in this branch of the law I shall deal in the two following sections. In the first of these two sections I shall deal with that new law of landlord and tenant, which was emerging at the close of the mediæval period, and was being rapidly developed in the sixteenth century. In the second, I shall deal with the development, by the central courts, of the law applicable to that copyhold tenure which, during the same period, had definitely superseded tenure in villeinage.

§ 7. Landlord and Tenant

At the close of the mediæval period, the decay of villein tenure had caused a large extension in the practice of letting land to farmers for terms of varying duration;[1] and during the sixteenth

[1] Vol. iii 205-206, 207 n. 5.

and seventeenth centuries, the policy of encouraging the farmer and the agricultural industry made for the continuance and extension of this practice.[1] "For the most part," said Coke in *Walker's Case*,[2] "every man is lessor or a lessee." In this period, therefore, we see the formation of one of the peculiar features in the English land system—the fact that "the great bulk of the land is not cultivated by the owner, but by tenant occupiers."[3] This, it has been said, "is a feature in the English land system not less singular in Europe than the law and custom of primogeniture."[4] Nor are these two singular features wholly unconnected. The practice of strictly settling land which, as we have seen,[5] grew up during this period, aimed at and succeeded in effecting the same results as were effected by the law of primogeniture. It tended to promote the accumulation of estates, and ensured their descent as one whole to a single proprietor. But, except in the case of those parts of these estates which were occupied by copyholders,[6] the only way in which these proprietors could exploit their properties was by letting them on lease to tenant farmers. Thus it happened that, during this period, these two factors—the agrarian policy of the state, and the law and custom of primogeniture as artificially extended by the system of strict settlement—united to make the relation of landlord and tenant a very common relation in the country at large. At the same time the growing commercial prosperity of the country made for the growth of urban districts, and the extension of this relationship to urban properties. Naturally, therefore, the law of landlord and tenant began to develop during this period, and its main principles began to be settled upon their modern basis.

I shall trace the history of some of the more salient features of this large chapter of our modern law under the following heads:—The Varieties of Tenancies, their Creation, and Incidents; The Obligations of the Lessor; The Obligations of the Lessee; Covenants Running with the Land and the Reversion; The Termination of the Tenancy.

The Varieties of Tenancies, their Creation and Incidents

These tenancies fall into two main groups. Firstly, there are tenancies for periods of more or less considerable duration; and, secondly, there are tenancies for periods of comparatively short duration, or of a wholly or almost wholly precarious kind. Under the first group fall tenancies for life or lives, and tenancies for

[1] Vol. iii 210, 216; vol. iv 364-373. [2] (1587) 3 Co. Rep. at f. 23a.
[3] Brodrick, English Land and English Landlords 198, citing Caird, Landed Interest 46, 47.
[4] Ibid. [5] Above 83. [6] Vol. iii 210-213; below 296 seqq.

terms of years. Under the second, tenancies at will and at sufferance, and tenancies from year to year.

(1) Technically the tenancies in the first class fall into the two widely separated groups of tenancies for life or lives which are freehold, and tenancies for terms of years which are chattel interests. The main incidents of estates for life were settled in the mediæval period.[1] They were restated by Coke;[2] and, when treating of this topic, Coke also gives some account of other estates which were classed with estates for life.[3] Estates limited on the lives of other persons were likewise freehold interests;[4] and they were a very common form of tenancy down to the end of the eighteenth century.[5] Considering the manner in which the incidents of such estates *pur auter vie* were regulated at common law, there is some justification for the view that it was "the most absurd form of tenancy that ever existed in a civilized estate."[6] But in point of fact the advantages conferred, both in the Middle Ages and later, by the possession of the freehold, explain the prevalence of both these forms of tenancy. During the greater part of the mediæval period it was the freeholder alone who could get specific restitution;[7] and later, when this had ceased to be a distinguishing feature of a freehold interest, it still continued to possess other advantages over a chattel interest. Being a freehold interest it conferred the Parliamentary franchise on the tenant; and the interest of a tenant who held under a lease for lives was not liable on his death for his simple contract debts.[8] The statute of 1540,[9] which conferred on certain limited owners the power to make leases, enumerates leases for life, for lives, or for twenty-one years; and this is fairly clear evidence that, in the sixteenth century, leases for life or lives were as common as leases for terms of years.

But, though leases of this kind continued to be common long after the mediæval period, they were tending to be replaced by leases for terms of years—generally, in the case of agricultural

[1] Vol. iii 120-123. [2] Co. Litt. f. 41b.

[3] "If a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and a woman during the coverture, or as long as the grantee dwell in such a house . . . or for any like incertain time. . . . In all these cases if it be of lands or tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made," ibid 42a.

[4] "You have perceived that our Author divides tenant for life into two branches, *viz.* into tenant for term of his own life, and into tenant for term of another man's life: to this may be added a third, *viz.* into an estate both for term of his own life, and for the term of another man's life," ibid 41b.

[5] Woodfall, Landlord and Tenant (19th ed.) 170-171.

[6] Ibid 171; see vol. iii 123-125. [7] Vol. iii 213-216.

[8] Woodfall, op. cit. 171 n.

[9] 32 Henry VIII. c. 28, amended by 34, 35 Henry VIII. c. 22; vol. iv 486-487; above 161.

leases, for a term of twenty-one years. Powers to make leases of this kind were frequently given in the sixteenth century;[1] and it would seem from Bridgman's Precedents in Conveyancing, that this was the power usually inserted in strict settlements.[2] No doubt life estates and leases for lives continued to be granted.[3] But life estates tend to be created principally in settlements; with the result that life tenants are not as a rule tenant farmers "holding merely under lease at a rent," but persons who would have been the absolute owners of the property but for the system of strict settlement; and leases for lives survived chiefly on ecclesiastical and college estates, on which the older system of estate management was maintained for a longer period.[4]

In fact a lease for a definite term of years had appreciable advantages over a lease for life or lives. For instance, its duration was definite; and this advantage, obvious enough even in the case of agricultural leases, was even more obvious in building and mining leases. It was a chattel interest; and this meant that its devolution upon an intestacy was governed by the more rational rules applicable to personal property. Being only a chattel interest, the lessor retained his seisin of the property, and the lessee only got possession. We shall see that a lease for years could, while a lease for life could not, be limited in futuro.[5] It is not surprising, therefore that, during the seventeenth and eighteenth centuries, these leases for terms of years tended to replace leases for life or lives.

It would seem that, down to the period of the Napoleonic wars, farmers generally held their land upon leases for fixed terms—often for twenty-one years;[6] and the period of twenty-one years allowed by the statute of 1540,[7] and generally permitted by powers inserted in strict settlements, is still the period allowed by the Settled Land Acts.[8] Agriculture was the most important form of industry down to the period of the industrial revolution; so that it is not surprising that the forms of other

[1] See e.g. the settlement in Whitlock's Case, dated 1576, 8 Co. Rep. ff. 69b, 70a; and, from the Marquis of Northampton's Case (1577) Dyer 357a, it appears that such a power was inserted in a settlement made by an Act of Parliament in 1544.

[2] Conveyances (ed. 1690) 132-133, 206, 207, 227, 266-267, 334.

[3] For powers to grant such leases see ibid 68-69, 132-133, 227.

[4] Woodfall, op. cit. 170, 171.

[5] Below 248-249.

[6] "It has been confidently asserted that English farms were commonly held under lease until the period of the French war at the end of the eighteenth century. No positive evidence exists by which such an assertion can be established, but the presumption is certainly in its favour, and it is supported by the indirect testimony of Adam Smith and Arthur Young. The prevalence of leases for terms of years may probably be one reason why no other form of security for unexhausted improvements was then demanded by tenants, and Arthur Young, complaining that some landlords will not grant leases at all, evidently regards them as a perverse minority," Brodrick, op. cit. 203.

[7] Above 240.

[8] 45, 46 Victoria c. 38 § 6.

leases, such as building and mining leases, were not settled till the nineteenth century. In 1805 Lord Eldon seemed to regard the insertion in a marriage settlement of a power to grant a building lease for 99 years as unusual.[1] But it is not improbable that some such period was then becoming the normal period;[2] and it is clear from the provisions of the Settled Land Acts that, towards the end of the nineteenth century, 99 years had become the usual period for a building lease, and 60 years for a mining lease.[3] In this, as in other respects, these Acts have codified the existing conveyancing practice.

(2) I have already given some account of the leading characteristics of an estate at will,[4] of the interest of a tenant holding at sufferance,[5] and of the right to emblements,[6] which was a leading characteristic of the estate at will. During this period and later, the law defined somewhat more precisely the circumstances under which these estates could arise and their incidents.

The essential quality of an estate at will had been defined by Littleton.[7] As the result of this definition, and as a consequence of later developments, it may be said to exist whenever a person, not being the servant or agent of the owner,[8] is in possession, with the consent of the owner, for an estate which is not a freehold estate, or an estate for any certain term.[9] Similarly, the position of a tenant holding at sufferance was the same as in the mediæval period.[10] The development of the law of mortgage has

[1] Attorney-General v. Owen (1805) 10 Ves. at p. 560; but he admits that building leases were sometimes made under a settlement for 60 or 90 years, ibid.

[2] See an article in 55 Sol. Journ. 420-421 in which it is suggested that the period of 99 years was fixed on as being the utmost limit of a man's life, and therefore a period sufficiently long to induce the tenant to lay out money on the property; "some confirmation of this theory may be found in the fact that very early law reports indicate leases for 99 years if a named person should so long live: terms of this description were in existence as early as the end of the sixteenth century [in Fox's Case (1610) 8 Co. Rep. 93b we have a lease for a gross term of 99 years]; and the selection of this limit on any large and well known estate would soon tend to its wider or general adoption. This would be followed by the express introduction into wills and settlements of a power similarly limited, and the recognition of the term as generally suitable for its purpose." It is suggested that the custom to lease for 999 years, customary in Yorkshire, may have grown up from the idea thrown out by Coke, see Cotton's Case (1613) Godbolt at p. 192, that a lease for 1000 years was presumptively fraudulent; *sed quaere*, as there is not much evidence to show that any great importance was ever attached to these or the like dicta, below 248; a similar explanation might be given of the lease for 99 years, below 248, but that given above seems to be far more likely.

[3] 45, 46 Victoria c. 38 § 6. [4] Vol. iii 125.

[5] Ibid. [6] Ibid. [7] §§ 68-72.

[8] Mayhew v. Suttle (1854) 4 E. and B. 347; Toms v. Luckett (1847) 5 C.B. at p. 38 *per* Maule, J.

[9] Stomfil v. Hicks (1698) 2 Salk. 413; Doe d. Rogers v. Pullen (1836) 2 Bing. N.C. 749; cp. Halsbury, Laws of England xviii 434.

[10] Co. Litt. f. 57b; it is there pointed out that, as against the king, there can be no tenant at sufferance; and that the estate will not arise when a person, such as a guardian in socage, whose estate is created by act of law, holds over; a guardian so holding over is an abator.

resulted in what is practically a new variety of this form of tenancy; for it seems to be the better opinion that a mortgagor, who remains in possession of the mortgaged property without the consent of the mortgagee, is in effect a tenant at sufferance.[1]

Such incidents of an estate at will as the circumstances under which the will of the landlord is determined,[2] the liability for waste,[3] the effect of the determination of the tenancy upon the liability for rent,[4] and the conditions under which the tenant may lose his right to emblements,[5] were more precisely determined by cases of this and the following period. The interest of a tenant at sufferance was also more accurately defined, and differentiated from an estate in the land. Thus, Coke points out that, while a release can be made to a tenant at will, no release can be made to a tenant at sufferance, because he has no estate in the land.[6] Having no estate, it follows that he has no right to emblements;[7] and that, having nothing to convey, he cannot by his alienation create another estate at sufferance.[8] The landlord, moreover, cannot distrain;[9] he can only bring an action for use and occupation.[10]

It was in the course of the sixteenth century that the estate from year to year made its appearance. The creation of these estates, rather than estates at will, was probably due to the inconvenience of estates at will. The tenant at will had no certain interest; and his right to emblements made the land of very little value to the landlord, who was practically deprived of the rent of the land while this right to emblements lasted. It was better, both from the point of view of tenant and of the landlord, that the tenant should have a better defined interest. From the point of view of the tenant, because he had a more assured position;

[1] Smith, Leading Cases (10th ed.) 524-527.
[2] Henstead's Case (1595) 5 Co. Rep. 10a; Disdale v. Iles (1673) 2 Lev. 88.
[3] Countess of Shrewsbury's Case (1601) 5 Co. Rep. 13b; below 275-281.
[4] "If H holds land at will, rendering rent quarterly, the lessor may determine his will when he pleases; but if he determines it within a quarter, he shall lose the rent which should have been paid for that quarter in which he determines it. So the lessee may determine it when he pleases, but then he must pay the quarter's rent," Leighton v. Theed (1702) 2 Salk. 413-414 *per* Holt, C.J.
[5] "It is commonly held in our books, that if a man leases land at will, and afterwards the lessee sows the land and afterwards the will is determined, that the lessee shall have the emblements; but it was agreed that if the lessee himself determines the will before the severance of the corn, he shall not have the emblements, because he has determined his interest by his own act," Oland's Case (1602) 5 Co. Rep. at f. 116a.
[6] Co. Litt. f. 270b.
[7] Doe d. Bennett v. Turner (1840) 7 M. and W. at p. 235 *per* Parke, B., citing Viner, Ab. *Emblements* 79.
[8] Thunder d. Weaver v. Belcher (1803) 3 East at p. 451 *per* Lord Ellenborough, C.J.
[9] Jenner v. Clegg (1832) 1 Mood. and R. 213.
[10] Bayley v. Bradley (1845) 5 C.B. at p. 406.

and from the point of view of the landlord, because he was entitled to rent to the end of the term.[1] These causes led landowners to create tenancies from year to year rather than tenancies at will. Both for these reasons, and also perhaps because it was in accordance with the agricultural policy of the state to encourage agriculture by keeping tenants on the land,[2] the courts began to favour these tenancies; and, for these reasons, to presume that a tenancy from year to year was intended, and not a tenancy at will, whenever a tenant entering upon or remaining in possession of premises, paid rent therefor. Thus tenancies from year to year arose not only by express creation, but also by presumption of law. Of the growth of these presumptive tenancies from year to year I must say a few words.

A somewhat obscure dictum of Willoughby in 1522[3] has been supposed to show that, at that date, the courts were inclined to construe a tenancy, when possible, as a tenancy from year to year.[4] It is doubtful whether his dictum can be made to bear this meaning. It would seem rather that, in the sixteenth century, the construction put upon the words used by the parties to these dispositions, gives little ground for thinking that the courts were then so disposed to lean in favour of construing a tenancy as a tenancy from year to year, as they afterwards became.[5] In 1601, in the case of *Agard v. King*,[6] it was held by Gawdy and Fenner, JJ., that, if there were a lease from year to year as long as the two parties pleased, "neither the one nor the other can determine the will during that year which he had begun to occupy"; and that therefore the rent was payable for that year. But Popham, C.J., held that it was a lease from year to year during the two complete years that the tenant occupied; but that, after the two years, it was a lease at will; so that, on his death in the third year, no action lay for the rent for that year. Popham's view was that taken by the court in 1606 in the *Bishop of Bath's Case*.[7] But the view taken by Gawdy and

[1] 2 Smith, Leading Cases (10th ed.) 126-127.

[2] Vol. iii 210-211, 216; vol. iv 364-372.

[3] Y.B. 13 Hy. VIII. Trin. pl. 1 (p. 15), "Semble que il doit mettre que lour volonte uncore continut: car touts fois ou on pled especial estat, il convient mettre chescun parcel en certainte; comme lease pur term d'autre vie il convient mettre que il est uncore en vie. . . . Donque ce semble lease par ans: car si le lessor ne don a luy garnir devant le demy an, il justifiera l'auter an, et issint de an in an."

[4] See the cases cited 2 Smith, Leading Cases (10th ed.) 127.

[5] It should be noted that Blackstone says, Comm. ii 147, "courts of law have *of late years leaned* as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please."

[6] Cro. Eliza. 775.

[7] 6 Co. Rep. at f. 35b; it was there resolved that a lease, *pro tempore unius anni et sic de uno anno in annum quamdiu ambabus partibus placuerit*, "after three years *ad maximum* was but a lease at will, because beyond that, the term has not any certain continuance or determination."

Fenner, JJ., was upheld by Holt, C.J., in 1702, who ruled that the landlord may determine his will at the end of any year; but that, if any new year be begun, it cannot be determined before the end of that year.[1] This ruling shows that opinion was beginning to lean in favour of construing a tenancy, when no certain term was mentioned, as a tenancy from year to year. In the latter part of the eighteenth century this leaning became so pronounced that, on one occasion, Lord Mansfield even went so far as to say that, "in the country, leases at will . . . . being found extremely inconvenient exist only notionally; and were succeeded by another species of contract which was less inconvenient."[2] This of course was an exaggeration. Tenancies at will still exist; and the presumption of the existence of a tenancy from year to year, arising from the payment of rent, can always be rebutted.[3] But the presumption had undoubtedly come to be very strong in the eighteenth century—so strong that it was held that, though the statute of Frauds had enacted that a parol lease should operate only as a lease at will, such a parol lease will operate as a lease from year to year if rent has been paid thereunder.[4]

These, then, were the main varieties of the estates or interests which gave rise to the relation of landlord and tenant. We must now consider some of the rules as to their creation and incidents.

A lease for life or lives could of course be created in any of the ways in which a freehold interest could be created—by feoffment, fine, recovery, or by conveyances operating under the statute of Uses. A term of years could be created by the owner of the freehold by conveyance operating under the statute of Uses,[5] or otherwise by words or writing.[6] Both forms of leases could arise by estoppel. The doctrine of estoppel is a part of the law of evidence; and I shall deal with it generally when I speak of the history of that branch of the law.[7] Here it will be sufficient to say that it was a principle as old as the Year Books, that a person could be estopped "by matter in pais, as by livery, by entry, by

[1] Leighton v. Theed (1702) 1 Ld. Raym. 707.

[2] Timmins v. Rowlinson (1765) 3 Burr. at p. 1609; so in Clayton v. Blakey (1799) 8 T.R. 3 Lord Kenyon, C.J., in giving reasons for holding that a parol lease for more than three years could operate as a tenancy from year to year, notwithstanding § 1 of the statute of Frauds, said that, "what was then considered as a tenancy at will has since been properly construed to enure as a tenancy from year to year."

[3] Halsbury, Laws of England xviii 440-441, 442-443.

[4] Doe d. Rigge v. Bell (1794) 5 T.R. 471; Clayton v. Blakey (1799) 8 T.R. 3; 2 Smith, Leading Cases (10th ed.) 125-126.

[5] See e.g. Fox's Case (1610) 8 Co. Rep. 93b.

[6] But it seems to have been thought that a lease by a married woman must be by deed, because it was only in this way that she could bind herself, Turney v. Sturges (1553) Dyer 91b; Whitley v. Gough (1557) Dyer 140b; but the later cases on this point are conflicting, see notes to Wotton v. Hale 1 Wms. Saunders 180.

[7] Vol. ix c. 7 § 1.

acceptance of rent, by partition, and by an acceptance of an estate," and also by deed.[1] This principle was easily applied to the relation of landlord and tenant. If that relationship had been in fact created by livery or entry or acceptance of rent, or the lease had been made by deed,[2] landlord and tenant were estopped from disputing one another's title.[3] In course of time the rules as to the circumstances under which an estoppel could arise, and as to its application, became both numerous and detailed.[4] Some of the most important of these rules were laid down during the seventeenth century. Thus it was settled that the estoppel only lasts during the term created;[5] and from this it was inferred that, if by a deed an interest passed, as where a tenant for life demised for years, the lessee was not estopped, on the death of the tenant for life, from showing that the lease had expired.[6] On the other hand, if a lessor who had no interest at all made the lease by deed, the lessor and lessee and their successors in title were estopped during the continuance of the lease;[7] and if the lessor afterwards acquired an estate, that estate will, as it is said, "feed the estoppel";[8] so that, as Hale put it, "by purchase of the land that is turned into a lease in interest, which before was purely an estoppel."[9]

We have seen that both leases for life or lives and leases for years, except leases for more than three years at a rent of at least two thirds of the annual value of the property demised, were required by the statute of Frauds to be in writing signed by the parties making the same.[10] We have seen also that, whether in

[1] Co. Litt. 352a; Litt. § 667.

[2] Note that "if the lease be made by deed indented, then are both parties concluded, but if it be by deed poll the lessee is not estopped to say that the lessor had nothing at the time of the lease made," Co. Litt. 47b.

[3] Ibid; cp. 2 Smith, Leading Cases (10th ed.) 808-809; note to Veale v. Warner 1 Wms. Saunders 327.

[4] See 2 Smith, Leading Cases, 808-813.

[5] "If a man take a lease for years of his own land by deed indented the estoppel doth not continue after the term ended. For by the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines," Co. Litt. 47b; Rawlyn's Case (1588) 4 Co. Rep. at f. 54a, citing a later case of 1591.

[6] "When the deed enures by passing of an interest . . . it should not be taken for any conclusion, no more than the lease for years of lessee for life by deed indented shall be an estoppel after his death, because at the commencement it took effect by way of passing an interest," Treport's Case (1595) 6 Co. Rep. at f. 15a; note to Walton v. Waterhouse, 2 Wms. Saunders 418.

[7] "If A had nothing in the land and made a lease for years by deed indented, and after purchase the land, the lessor is as well concluded as the lessee to say that the lessor had nothing in the land," Co. Litt. 47b; Trevivan v. Lawrence (1705) 1 Salk. at p. 276.

[8] Ibid.

[9] Cited in the notes to Walton v. Waterhouse 2 Wms. Saunders 418; and it would seem that a lease may operate as to part by estoppel, and as to the residue by passing an interest, Gilman v. Hoare (1693) 1 Salk. 275 *per* Holt, C.J.

[10] 29 Charles II. c. 3 §§ 1 and 2; vol. vi 384-385.

writing or not, none of these leases, other than leases which took effect by the operation of the statute of Uses, could take effect without a physical transfer of possession.[1] Just as in the case of a feoffment, a livery of seisin was necessary to complete the conveyance, so in the case of a lease for a term of years, the entry of the lessee was necessary. Just as a feoffment was inoperative to confer an estate without livery of seisin, so a lessee before entry gets no estate, but only an interesse termini.[1] But it should be noted that the position of a feoffee who has not got livery of seisin, and the position of a lessee for years who has not entered, are not identical; for while a feoffee took nothing till livery of seisin was made,[2] the interesse termini taken by the lessee for years gave him a certain interest in the property. "True it is," said Coke,[3] "that to many purposes he is not tenant for years until he enter; as a release made to him is not good to him to increase his estate before entry; but he may release the rent reserved before entry in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion before entry. But the lessee before entry hath an interest *interesse termini* grantable to another. And albeit the lessor die before the lessee enters, yet the lessee may enter. . . . And so if the lessee dieth before he entered, yet his executors and administrators may enter, because he presently by the lease hath an interest in him."

In certain other respects also the rules relating to the creation and incidents of a term of years, differed from the rules relating to the creation of a freehold interest. Firstly, the distinguishing characteristic of a lease for life or lives was necessarily the uncertainty of the termination of the lease: the distinguishing characteristic of a lease for a term of years was the certainty of the term. "Every contract," it was said in *Say v. Smith*,[4] "sufficient to make a lease for years ought to have certainty in three limitations, *viz.* in the commencement of the term, in the continuance of it, and in the end of it: so that all these ought to be known at the commencement of the lease"; and this principle, though elaborated by the growth of rules as to what limitations will be sufficiently certain, has always been observed.[5] Secondly, provided that the term was certain, there was no limit to its length;

[1] Vol. iii 249. [2] Ibid 221-225. [3] Co. Litt. 46b.

[4] (1564) Plowden at p. 272; "and Dyer said that in his knowledge it has been adjudged here in this court, that when a parson makes a lease of his parsonage for five years, and so from five years to five years during his life (as it is their common custom to make leases) it is only a lease for ten years in all, and no longer, although the lessor continues parson longer, and the reason is because there is no certainty of years beyond the ten years," ibid at p. 274; for the way in which this rule was evaded by covenants to renew see below 260-261.

[5] Rector of Cheddington's Case (1599) 1 Co. Rep. at f. 155a; Anon. (1674) 1 Mod. 180; for the modern rules see Halsbury, Laws of England xviii 456-459.

and this made the doctrine that "an estate for years is less in the judgment of law than an estate for life,"[1] a very artificial doctrine, which has given rise to some curious rules as to the manner in which a term can be limited,[2] and has sometimes, by reason of the doctrine of merger, worked hardship.[3] In spite of Coke's statement that, "by the ancient law of England for many respects a man could not have made a lease above forty years at the most";[4] it is not probable that this was ever the law; for the statement comes from that legal romance, the "Mirror of Justices";[5] and there is evidence that, at the time when the Mirror was written and shortly after, leases for very long periods were made.[6] It is true that there are some hints in the Year Books, that a lease for a hundred years or more to a religious house might be held void as infringing the policy of the mortmain laws;[7] and that in a case of 1613 it was said that a lease for a thousand years might be held to be void, on the ground that it was made with intent to defraud the king of his incidents of tenure.[8] But these are little more than vague hints and dicta, which have never materialized into any definite rules. Landowners were left free to make leases for a term of any length that they pleased; and we shall see that the conveyancers made extensive use of these facilities to obviate some of the inconveniences arising from the practice of strictly settling land.[9] Thirdly, a lease for years being a chattel interest, no estate in remainder could be created out of it.[10] A man could not at common law settle a term to one for life with remainders over, as he could settle a fee simple. But, in the case of a lease for years, he could do what he could not do in the case of a freehold interest—create a lease to begin in futuro.[11] It followed

[1] Case of Alton Woods (1600) 1 Co Rep. at ff. 50b, 51a.

[2] Welcdon v. Elkington (1578) Plowden at p. 520, where both Dyer and Popham held that a grant by a lessee for years of all the term which should be to come at his death was void—"for in that he will hold the term during his own life, thereby he holds it for a time, which is as long as he has an interest in the land, so that there is no certainty that the term will ever commence"; cp. Gray, Perpetuities (2nd ed.) 570-571; but the contrary seems to have been ruled by Holt, C.J., in 1699, 1 Ld. Raym. 737.

[3] Williams, Real Property (22nd ed.) 547-548; but, as early as the end of the seventeenth century, equity had begun to relieve against the hardships sometimes occasioned by the strict common law rules as to merger, see Thorn v. Newman (1673) 3 Swanst. 603; Nurse v. Yerworth (1674) ibid at pp. 618-619; Loyd v. Langford (1677) 2 Mod. 174.

[4] Co. Litt. 45b, 46a.

[5] Bk. II. c. xxvii; for this work see vol. ii 327-333.

[6] P. and M. ii 112.

[7] Y.BB. 4 Hy. VI. Hil. pl. 1 *per* Martin; 3 Ed. IV. Mich. pl. 8 p. 13 *per* Nele; Brook, Ab. *Mortmain* pl. 39 = Pasch. 29 Hy. VIII.; Brook's reasoning in the last named case shows that the doctrine was very nebulous.

[8] Cotton's Case, Godbolt, at p. 192; as to leases made with this intent, see vol. iv 465 n. 2, 472; vol. v 306-307; vol. vi 641.

[9] Below 380, 384.

[10] (1537) Anon. Dyer at f. 7a; North v. Butts (1557) ibid at f. 140b.

[11] "It was resolved that an estate of freehold could not by the common law begin in futuro, but ought to take effect presently in possession, reversion, or remainder.

from this that, though a remainder cannot be created of a term of years, a reversionary lease, to begin after a lease already granted, can be created. Thus where A let a manor for thirty years, and the next day let it to another for forty years, it was held to be a good grant of a reversionary lease.[1] Fourthly, a term of years, being a chattel interest, cannot be entailed [2] though, in the latter part of the seventeenth century, it was recognized that equity allowed the trust of a term, limited to attend upon the inheritance, to be entailed.[3]

But, though, in certain respects, the incidents of a lease for life or lives differed from the incidents of a lease for years, in this, as in the preceding period,[4] these differences are small in comparison with their fundamental resemblances. No doubt estates for life or years arising under settlements, differed fundamentally from estates for life or years created in favour of rent-paying tenants. But, if the lease was made to a rent-paying tenant, the incidents of the relation of landlord and tenant were not much affected by the fact that a lease for life was a freehold, and a lease for years merely a chattel interest. The fundamental similarity between the position of a landlord who has leased his land for life, and that of a landlord who has leased his land for a term of years, was recognized as early as 1558. Upon objection being taken to the pleading of a lessor for a term of years, who had alleged that he was seised "as of fee and of right," whereas, he ought to have pleaded that he was seised "in his demesne as of fee," the court answered, "that true it is he might have said so, and it would have been good, and yet the other form of pleading is good also. For when a man has made a lease for years, he cannot of right meddle with the demesne, nor the fruits thereof, but he has the reversion, and the things incident to it, as fealty. And the reversion cannot properly be said to be in demesne, but demesne is properly so called when a man has the thing in possession, for which reason a man may say of a reversion dependant upon an estate for years, as well as dependant upon an estate for life, that he was seised as of fee." [5]

Perhaps the best illustration of the fundamental similarity, can be seen in the manner in which some of the principles applicable to the tenure of, and estates in, freehold interests in

And the difference is between a lease for life, and a lease for years: for a lease for years may begin in futuro, but not a lease for life," Barwick's Case (1597) 5 Co. Rep. at f. 94b.

[1] Palmer v. Thorpe (1590) Cro. Eliza. 152; cp. Throckmerton v. Tracy (1556) Plowden at p. 159; Justice Windham's Case (1589) 5 Co. Rep. 7a; Bishop of Bath's Case (1606) 6 Co. Rep. at f. 36a.

[2] Leonard Lovie's Case (1614) 10 Co. Rep. at f. 87b.

[3] Sir Ralph Bovy's Case (1672) 1 Ventr. at pp. 194-195 *per* Hale, C.J.

[4] Vol. iii 248-249.

[5] Wrotesley v. Adams Plowden at p. 191.

land, were applied to the relation of lessor and lessee for a term of years. Thus, in the first place, fealty was due from lessor to lessee.[1] In the second place, the lessor, by reason of the tenure which existed, could distrain.[2] In the third place, the different effects of an assignment and an under-lease by a lessee for years, may be compared to the different effects of a conveyance in fee simple and a conveyance for a smaller estate by the owner of the fee. In the case of an assignment the assignee steps into the place of the assignor, and becomes liable to pay the rent, and to perform covenants in the lease which run with the land.[3] It may thus be compared to an alienation in fee simple, as the result of which the alienee holds, not of the alienor, but of the alienor's lord.[4] On the other hand, in the case of an under-lease, a new estate is created, which is held by the under-lessee of the under-lessor; and, because it is a new and a different estate, the under-lessee is not liable upon any of the covenants in the head lease.[5] It may thus be compared to the creation by a tenant in fee simple of a life estate or an estate tail, as the result of which the life tenant or the tenant in tail holds of the tenant in fee simple.

In this, as in the preceding period, landlords and tenants were left very free to mould as they pleased the conditions of the tenancies created by them. The history of the manner in which they used this power, and of the many varied covenants usually found in leases of different kinds, is too large a subject to be discussed in any detail here. All that can be attempted is to illustrate from some of the obligations imposed upon the lessor and the lessee, either by law or by their agreement, the manner in which some of the leading principles of the law of landlord and tenant have grown up. These illustrations will show us that, as in the evolution of the rules relating to the creation and incidents of leases for a term of years, so in the moulding of the rights and duties of the parties to them, some modifications have been made in the rules applicable to leases for freehold interests; but that, in the main, the analogy of these rules has been followed. With this topic I shall deal in the three succeeding sections.

The Obligations of the Lessor

Under this head I propose to discuss, (1) the lessor's covenants for title and quiet enjoyment; (2) rules relating to the description of the property let; and (3) covenants for renewal.

[1] Wrotesley v. Adams Plowden at p. 191; vol. iii 217 n. 3.
[2] Ibid.
[3] Below 272, 291.
[4] Vol. iii 80-81.
[5] Below 291.

(1) *The lessor's covenants for quiet enjoyment and title.*

Under this head we must consider, (i) the historical origin, and (ii) the later development, of these covenants.

(i) Historical origins.

As early as the fifteenth century it was recognized that, when land was let for a term of years, the relation of landlord and tenant gave rise to implied covenants for quiet enjoyment and title.[1] It is probable that this rule was derived from the analogous rule that, on a feoffment for an estate of freehold, a warranty for quiet enjoyment and title was implied;[2] and it was the more reasonable to give such a remedy in this case, for, as the Year Books cited point out, the lessee if ejected, would otherwise have had no remedy.[3] The rule, in the case of a feoffment, had been recognized and defined in 1276[4] by a clause of the statute De Bigamis.[5] This clause enacted that in deeds in which land was granted to be held of the donors and their heirs, and in which were contained the words "dedi et concessi tale tenementum," a clause of warranty should be implied. It was not difficult to hold that, just as the service reserved and the reversion created by such a feoffment gave rise to this duty of warranty,[6] so the rent reserved and the reversion created by the grant of a term of years, gave rise to an analogous obligation. This analogy determined, to some extent, the nature of this implied obligation. Thus we shall see that, just as the obligation of the old warranty on a feoffment for an estate of freehold, where rent was reserved, bound the assignee of the reversion,[7] so the obligation of this implied covenant on a lease for years bound the assignee of the lessor.[8] But, as we shall now see, the further development of the nature and extent of this implied covenant, by decisions of

[1] "Nota que *Pole* dit al barre, si lease soit fait a term d'ans per fait, issint que il est chargeable a bref de Covenant, si estrange qui n'ad ascun droit oustra le termor, uncore il n'avera bref de Covenant envers son lessor: mes si cesty que droit ad oustra le termor, donque il aura bon brief de Covenant envers son lessor," to which *Newton* assented, Y.B. 22 Hy. VI. Pasch. pl. 26; "Nienobstrant que n'est nul garrantie en l'endenture, que le termor aura action de Covenant envers le lessor, pur ceo que auterment le termor est sans remedy envers l'estranger que ad entre per bon title," *per* Nedham, Y.B. 32 Hy. VI. Hil. pl. 27.

[2] Vol. iii 160, 230.

[3] Above n. 1.

[4] 4 Edward I. st. 3 c. 6; vol. iii 160.

[5] "In cartis autem, ubi continetur dedi et concessi tale tenementum, sine homagio, vel sine alia clausula continente warantiam, et tenendum de donatoribus et heredibus suis per certa servicia; concordatum est per eosdem quod donator et heredes sui tenentur ad warrantizandum. Ubi autem continentur dedi concessi, tenendum de capitalibus dominis foedi; aut de aliis quam de feoffatoribus vel de heredibus suis, nullo servicio sibi retento, sine homagio vel sine dicta clausula warrantia, heredes sui non teneantur ad warrantiam. Ipse tamen feoffator ratione doni sui proprii tenetur warrantizare."

[6] "Et il dit que un reversion est cause de voucher, et auxey de recovery en valu, et cesty qui fuit le lessor ne disclaimera: auterment est de son grantee, il poit disclaim et avoid son charge," *per* Frowicke Y.B. 10 Hy. VII. Mich. pl. 25.

[7] Below 256, 288.

[8] Ibid.

the fifteenth sixteenth and seventeenth centuries, has caused it to differ considerably from the old obligation of warranty from which it was derived.

(ii) The later development of these covenants.

Under this head it will be necessary to consider, (*a*) The construction put upon this implied covenant, and the growth of the modern practice of entering into express covenants; (*b*) the differences between the implied covenant and the old implied warranty; (*c*) the reasons for the disappearance of the old implied warranty.

(*a*) The construction put upon this implied covenant, and the growth of the modern practice of entering into express covenants.

The construction put by the courts upon this implied covenant, during the fifteenth sixteenth and seventeenth centuries, had given rise to the following rules:—In the first place, it is a covenant against the acts of the lessor, and those who claim the land by title paramount to that of the lessor. It is not a covenant against the acts of wrongdoers. This principle was clearly stated in the Year Books of Henry VI.'s reign;[1] it has ever since been adhered to;[2] and it has been applied to express as well as implied covenants.[3] The reason for this limitation was explained in 1534.[4] If, it was said, the lessee is disturbed by a wrongdoer he can bring ejectment, so that he has a sufficient remedy; but, if he is disturbed by one who enters by title paramount to that of the lessor, he has no remedy by ejectment against the wrongdoer, and can therefore sue the lessee on the covenant.[5] This principle was restated with great elaboration by Vaughan, C.J., in 1669 in the case of *Hayes v. Bickerstaff*.[6] In the second place, as the existence of the covenant depends upon the existence of the relation of landlord and tenant, its obligation ceases with the expiration of the term granted. Thus, when a tenant for life let for fifteen years, and the tenant for life died within the term, and the lessee was ousted by the remainderman, it was held that the executors of the tenant for life "should not be charged by his covenant in law, because the covenant in law ends and determines with the

[1] Y.BB. 22 Hy. VI. Pasch. pl. 26; 32 Hy. VI. Hil. pl. 27; cf. Platt, Covenants 313.

[2] Andrew's Case (1591) Cro. Eliza. 214.

[3] Nokes's Case (1599) 4 Co. Rep. at f. 80b; 2 Wms. Saunders 178, and cases there cited; cf. Markham v. Paget [1908] 1 Ch. at pp. 716-717 *per* Swinfen Eady, J.

[4] Y.B. 26 Hy. VIII. Trin. pl 11.

[5] "Il n'aura nul brief de Covenant vers son lessor quand il est ouste per tort: car il n'est a nul mischief, pur ce que il doit aver bref de Trespass ou Ejectione firmæ vers celuy que luy ousta, mes s'il fuit ouste per un que ad title paramount vers qui il ne poit aver remedy, doncque il poit aver bref de Covenant vers son lessor per force de ceux parols de garrantie. *Quod fuit concessum* par plusieurs"; and see above 251 n. 1.

[6] Vaughan 118.

estate and interest of the lessee."[1] In the third place, the lessee suing on the covenant must show, firstly, that his title or possession has been disturbed. When a lessee sued for the breach of a covenant for quiet enjoyment, and could only show that his lessor had got an injunction against him in Chancery, he naturally failed—"The suit in Chancery here is not touching the lessee's estate or title, but for waste which he ought not to do; and though the suit might be groundless yet, it not relating to his title or possession, was no breach of covenant."[2] Secondly, he must show that his title or possession has been disturbed by the lessor, or by someone claiming by title paramount. An allegation that he had been disturbed, without showing by whom and how, was not sufficient, as otherwise he might recover for the act of a mere wrongdoer, against whose acts the implied covenant did not extend.[3]

It will be apparent that the implied covenant was not wholly satisfactory. It was not satisfactory from the point of view of the lessee, because, as we have seen, it ended with the expiry of the lessor's estate.[4] It was not satisfactory from the point of view of the lessor, because it extended, not only to his own acts, but to the acts of those who claimed by title paramount.[5] It therefore became customary for lessors and lessees to make express covenants; and it was held in *Nokes's Case*,[6] and, after a little hesitation,[7] finally settled,[8] that these covenants "qualified the generality of the covenant in law and restrained it by the mutual consent of both parties."[9] These express covenants were more satisfactory to the lessee, in that their obligation did not end with the expiry of the lessor's estate.[10] They were more satisfactory to the lessor, in that they were generally so worded that they extended only to the acts of the lessor and those claiming under him, and not to the acts of those who claimed by title paramount.[11] Though they might be so worded as to extend to the acts of mere wrongdoers,[12] the court generally construed

[1] Swan v. Stransham and Searles (1567) Dyer at f. 257b.
[2] Morgan v. Hunt (1691) 2 Ventris 213.
[3] Nokes's Case (1599) 4 Co. Rep. at f. 80b; Kirby v. Hansaker (1613) Cro. Jac. 315; Wotton v. Hale (1669) 2 Wms. Saunders at pp. 178-179.
[4] Above n. 1. [5] Above 252 and n. 5. [6] (1599) 4 Co. Rep. 80b.
[7] Proctor v. Johnson (1609) 2 Brown and Golds, at p. 214.
[8] Hayes v. Bickerstaff (1669) Vaughan at p. 126; Deering v. Farrington (1674) at p. 113 *per* Hale, C.J.; 2 Wms. Saunders 178n.
[9] 4 Co. Rep. at f. 80b.
[10] Swan v. Stransham and Searles (1567) Dyer at f. 257b; Baynes and Co. v. Lloyd and Sons [1895] 2 Q.B. 610.
[11] Y.B. 26 Hy. VIII. Trin. pl. 11; Andrew's Case (1591) Cro. Eliza. 214; Markham v. Paget [1908] 1 Ch. at pp. 717-718 *per* Swinfen Eady, J.; Woodfall, Landlord and Tenant (8th ed.) 779; Platt, Covenants 318-319.
[12] See e.g. Mountford v. Catesby (1574) Dyer 328a; Stevenson v. Powell (1612) 1 Bulstr. 182-183; Chaplain v. Southgate (1718) 10 Mod. 383.

them as not extending to the acts of wrongdoers, for the same reasons as it refused to extend the implied covenant to this case.[1] In fact, by the beginning of the seventeenth century, on a lease, just as on a sale of the fee simple,[2] express covenants were usually entered into, that the lessor had the right to demise,[3] for quiet enjoyment,[4] for further assurance,[5] and against incumbrances;[6] to which was later added the covenant that the lease is subsisting, and that the lessor's covenants have been performed.[7]

Just as the warranty implied from a feoffment included both an undertaking that the tenant should quietly enjoy and an undertaking that the feoffor had a title to convey the estate, so the obligations implied from the letting of land for a term of years included both a covenant for quiet enjoyment and a covenant for title. The scope of this covenant for title was naturally limited, in the same manner as the scope of the covenant for quiet enjoyment.[8] Its operation is illustrated by the case of *Holder v. Taylor*.[9] In that case a lessor demised land which was then in the occupation of a stranger, so that the lessee could not get possession. It was held that the lessee could sue on the implied covenant. "For the breach of the covenant was in that the lessor had taken upon him to demise that which he could not. . . . And it is not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass.[10] But this implied covenant for title would, like the implied covenant for quiet enjoyment, be superseded by the terms of the express covenants already described. As these express covenants became common, and as the implied covenant for quiet enjoyment met most of the cases in which the lessee was disturbed, there is comparatively little authority on this implied covenant for title.

(*b*) The difference between the implied covenant and the old implied warranty.

The development of the law as to the covenant implied from the letting of land for a term of years, had, in the sixteenth

[1] Platt, Covenants 313; above 252 and n. 5. [2] Vol. iii 163.

[3] Bradshaw's Case (1613) 9 Co. Rep. 60b.

[4] Noke v. Awder (1594) Cro. Eliza. 373; in Y.B. 32 Hy. VI. Hil. pl. 27 Littleton said that, if I am obliged by my deed to warrant the title of a lessee for years "et estranger luy ouste per title, il aura action de covenant envers moy"; and for a similar ruling on a clause of express warranty in a lease for life, see Pincombe v. Rudge (1609) Hob. 3.

[5] Boulney v. Curteys (1610) Cro. Jac. 251.

[6] Briscoe v. King (1612) Cro. Jac. 281.

[7] A case of 1636 is cited by Rolle Ab. *Parols* D. pl. 2, in which, on the assignment of a lease for lives, a covenant was entered into to the effect that two of the lives on which a lease depended were in being.

[8] Baynes and Co. v. Lloyd and Sons [1895] 2 Q.B. at p. 617; above 253.

[9] (1614) Hob. 12; cp. Mostyn v. West Mostyn Coal and Iron Co. (1876) 1 C.P.D. at p. 152.

[10] Hob. at p. 12.

century, begun to accentuate the differences between it and the old warranty implied on a feoffment for an estate of freehold. Therefore, as Coke several times points out, the implied obligations of a lessor for life had come to differ materially from the implied obligations of a lessor for a term of years.[1] These differences were briefly as follows:—

Firstly, it is clear from the words of the statute De Bigamis[2] that the warranty was implied from the use of particular words. It is not, therefore, surprising that the belief should have sprung up, that the covenant implied from a lease for a term of years arose from the use of particular words, such as "demise," or "grant." This view has had its adherents right down to modern time; and its latest authoritative exposition was given by Kay, L.J., in *Baynes and Co. v. Lloyd and Sons.*[3] It is true that the language of some of the cases and books of authority in the sixteenth and seventeenth centuries may be construed as confirming it;[4] but no such rule can be extracted from the Year Books;[5] and it does not necessarily follow from the cases and books cited in support of it.[6] The better opinion, and the one which seems to me to be most in accordance with historical fact, is that of Parke, B., to the effect that it is the letting—the creation of the relation of landlord and tenant—and not the use of any particular word or words, which gives rise to the implied covenant.[7] It follows therefore that in this respect the conditions under which the covenant is implied, differ from the conditions which gave rise to the warranty implied from a feoffment.

Secondly, the warranty implied from the word "dedi" on a

[1] "A voucher . . . extendeth to lands or tenements of an estate of freehold or inheritance, and not to any chattel real personal or mixt, saving only in case of a wardship granted with warranty . . .; for in the other cases concerning chattels, the party, if he hath a warranty shall not vouch, but have his action of covenant if he hath a deed, or if it be by parol, then an action upon his case or an action of deceit," Co. Litt 101b; ibid 365a, 384a; Nokes's Case (1599) 4 Co. Rep. 80b.

[2] Above 251 n. 5.

[3] [1895] 2 Q.B. 610.

[4] See the cases considered from this point of view [1895] 2 Q.B. at pp. 612-614.

[5] Above 252 n. 5.

[6] Thus in Nokes's Case (1599) 4 Co. Rep. 80b the covenant is said to be implied by the words "demise grant etc."; and in Co. Litt. 384a by "grant demise and the like"; see Budd-Scott v. Daniell [1902] 2 K.B. at pp. 359-361, for Darling J.'s criticism on Kay L.J.'s use of Shepherd's Touchstone and other authors.

[7] "It is clear that from the word 'demise' in a lease under seal, the law implies a covenant, in a lease not under seal a contract, for title to the estate merely, that is for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let,' or any equivalent words (Shep. Touch. 272) which constitute a lease, have no doubt the same effect but not more," Hart v. Windsor (1843) 12 M. and W. at p. 85; cp. Budd-Scott v. Daniell [1902] 2 K.B. 351; Jones v. Lavington [1903] 1 K.B. 253 follows what was supposed to be decided in Baynes and Co. v. Lloyd and Sons in a very unintelligent fashion, and wholly disregards the earlier authorities which decide that the implied covenant does give a remedy against those claiming by title paramount, above 252.

lease for life, bound the feoffor, during the feoffor's life, to give lands of equal value to the feoffee;[1] or, if rent were reserved, it bound the feoffor his heirs and assigns to warrant the title of the feoffee and his assigns.[2] This right could be asserted by vouching the feoffor to warranty, or by bringing an action on a writ of warrantia cartae, or by using it as a "rebutter" or defence to an action for the land.[3] On the other hand, the action on the covenant implied on a lease for years, only bound the lessor or his assignee to pay damages to the lessee or his assignee, if the lessee or his assignee were disturbed. The first was a covenant real, the second a covenant personal.[4] From these differences three consequences were deduced. Firstly, it was only the tenant for the time being of the land who could sue on the warranty, but the lessee for a term of years could sue the lessor on the covenant, though he was ousted from the land.[5] Secondly, if a lessee was in a position to sue, both on the warranty implied from the word "dedi," and on the covenant implied from the relation of landlord and tenant, he could take advantage of both.[6] Thirdly, an express warranty or an express covenant would not take away the right to sue on the warranty implied from the word "dedi,"[7] but an express covenant would take away the right to sue on the covenant implied from the relation of landlord and tenant. Seeing that the existence of the express warranty did not take away the right to sue on the implied warranty, it is somewhat difficult to see why an express covenant should take away the right to sue on the implied covenant; and it is not

[1] "Dedi is a warranty in law . . . during the life of the feoffor," Co. Litt. 384a; "If a man makes a feoffment by this word 'dedi,' which implies a warranty, the assignee of the feoffee shall not vouch," Spencer's Case (1583) 5 Co. Rep. at f. 17a.

[2] "If a man make a gift in tail, or a lease for life of land, by deed or without deed, reserving a rent . . . this is a warranty in law, and the donee or lessee being impleaded, shall vouch and recover in value. And this warranty in law extendeth not only against the donor or lessor, and his heirs, but also against his assigns of the reversion; and so likewise the assignee of the lessee for life shall take the benefit of this warranty in law," Co. Litt. 384b; below 287-288.

[3] See vol. iii 159-160 for these processes; and cp. Co. Litt. 365a.

[4] "But note there is a diversity between a warranty that is a covenant real which bindeth the party to yield lands or tenements in recompense, and a covenant annexed to the land, which is to yield but damages," Co. Litt. 384b; for the extent to which these covenants could be made to run with the land or the reversion as between landlord and tenant see below 288; for the question how far they could be made to run as between a vendor and purchaser of an estate in fee simple see vol. iii 159-166.

[5] "Il est diversite perenter covenant real, i.e. un guarantie del fee ou frank tenement, et garrantie d'un chatel: car si jeo enfeoffe vous ove garrantie, vous n'aurez oncques avantage de cel garrantie sinon que vous soiez tenant de terre: mes si jeo lesse terre per terme d'ans ove garrantie, le lessee aura brief de covenant vers moy, nienobstant q'il soit ouste de son terme. *Quod fuit concessum per Totam Curiam.*" Y.B. 26 Hy. VIII. Trin. pl. 11.

[6] Nokes's Case (1599) 4 Co. Rep. at f. 81a; Pincombe v. Rudge (1609) Yelv. 139; S.C. Hob. 3.

[7] Nokes's Case (1599) 4 Co. Rep. 80b.

surprising that doubts should have been expressed.[1] But it would seem from *Nokes's Case*, which finally established the rule, that it was based principally on considerations of expediency. Any other construction would have defeated the purpose with which these express covenants, which had then become very usual, had been entered into.[2]

(*c*) The reasons for the disappearance of the old implied warranty.

Not much is heard of the warranty implied on a feoffment for life after the middle of the seventeenth century.[3] The reasons are fairly obvious. In the first place, the procedure by which it was enforced was becoming obsolete. We have seen that it could be enforced only by voucher or by writ of warrantia cartæ.[4] It could be used as a defence, but only in a real action. It could not be used as a defence in an action of trespass.[5] Therefore it was not at first available as a defence in the new action of ejectment; but the inconvenience of this rule, and the desire of the courts to favour this new action, induced them to allow a defendant to get the benefit of the warranty by giving it in evidence.[6] In spite, however, of this relaxation, it was a remedy which was bound up with the real actions. It therefore fell out of use with them, and for the same reasons as they fell out of use.[7] In the second place, unless rent was reserved, it bound only the feoffor.[8] It suffered therefore from a defect very similar to that which rendered the implied covenant comparatively valueless. For just as the obligation of the lessor's implied covenant came to an end on the determination of the lessor's interest,[9] so the obligation of the

[1] Above 253.

[2] "And there is great reason in the principal case, that the particular covenant subsequent, should qualify the general force of the word *demise*, for otherwise the particular covenant would be in vain, if the force of this word *demisi* should stand, and also these words *demisi at concessi* are frequent in every ordinary lease that is made," 4 Co. Rep. at f. 81a.

[3] Thus Booth, Real Actions 241, writing in 1701, says "this action is brought rarely, though sometimes at this day it may be, for I remember one about 20, or 22 years ago, before the justices of Chester . . . I conceive it was about 15 or 16 Car. 2. Another there is, the last sessions at Chester Assizes, April 10 W. 3."

[4] Above 256.

[5] Brook, Ab. *Garranties* pl. 87; Y.B. 20 Hy. VII. Mich. pl. 11.

[6] "It was resolved that if the collateral warranty should bind, that it might well be given in evidence and found by the jury, although some opinions *obiter* be to the contrary. . . . For although a collateral warranty gives not a right, yet in law it bars and binds a right, and therefore may be given in evidence; and *eo potius* because now in *ejectione firmæ* and other personal actions, it cannot be pleaded by way of bar," Edward Seymor's Case (1613) 10 Co. Rep. at f. 97b; "if it should be otherwise then all would flee and resort unto real actions: but the nature of this warranty is such that the right of it in such actions in which it cannot be pleaded, that the same shall always be saved for the benefit of the party," *per* Fleming. C.J., Hayward v. Smith (1612) 1 Bulstr. at p. 167; above 18; these cases deal only with collateral warranties (vol. iii 118); but it would seem that the reasoning applies equally to other warranties.

[7] Above 5-7. [8] Above 256. [9] Above 253.

implied warranty came to an end on the death of the feoffor. Even if rent were reserved, so that it bound the feoffor's heirs and assigns, or even if an express warranty binding the heirs were made by the feoffor, the heirs were only bound if they had assets by descent; and the personal representatives and the personal estate were not bound.[1] For these reasons, therefore, the old warranties, implied or expressed, disappeared;[2] and the old implied warranty was abolished in 1845.[3] The covenant implied from the relation of landlord and tenant, which originated from the old implied warranty, has survived; but it is little used; for, as we have seen,[4] it, too, has in practice long been superseded by express covenants for quiet enjoyment.

(2) *Rules relating to the description of the property let.*

By the end of the sixteenth century the common law had acquired a large vocabulary of words, used by conveyancers in leases of lands or buildings or various rights over land. A large number of these words are catalogued and defined by Coke;[5] the courts had begun to discuss their meanings;[6] and a certain number of rules had already been laid down as to what would pass by the use of some of these words. Thus Coke lays it down in *Bettisworth's Case* that, "when a man makes a feoffment of a *messuage cum pertinentiis* he departs with nothing thereby but what is parcel of the house *scil.* the buildings curtilage and garden."[7] Other cases, on the other hand, laid it down that the words "with the appurtenances" were surplusage; and other cases seem to draw a distinction in this respect between a demise of a "house" and a "messuage."[8] In these questions of the interpretation of words used to pass the property, and indeed in most questions of interpretation of the intention of the parties,[9] our system of case law shows its weakest side. Cases are piled up on cases; and the attention of the judge is diverted from the task of elucidating the document before the court, to the task of considering what meanings other judges have attached to similar words in other documents. The confusion so caused was even greater, when it was a question of what easements or quasi-easements passed by the

[1] Bl. Comm. ii 304.

[2] "If he covenants also for his executors and administrators his personal assets as well as his real are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty, and it has therefore in modern practice totally superseded the other," ibid.

[3] 8, 9 Victoria c. 106 § 4.

[4] Above 253-254.

[5] Co. Litt. 4a-6a; see also 56a, b.

[6] See Hill v. Grange (1557) Plowden at pp. 168-172.

[7] (1580-1591) 2 Co. Rep. at f. 32a.

[8] A good account of these cases will be found in the note to Smith v. Martin 2 Wms. Saunders 401.

[9] Below 393-395.

use of the word "appurtenances," or other general words of that kind. The long line of cases dealing with this topic begins in this period;[1] and the result of reporting cases raising this kind of question was that conveyancers piled up long lists of general words, which they inserted in conveyances, sometimes without much consideration of whether they were really applicable or not.[2] But this only added to the confusion. The courts paid very little attention to these long lists of words; and continued to lay down general rules of interpretation, which made for the further complication of the law rather than for its elucidation.[3] Some improvement was made by the Conveyancing Act, which has laid it down authoritatively exactly what a conveyance of land is to be deemed to include.[4]

Of the rules of law which defined the rights of the landlord and tenant to such things as timber, minerals, and game I shall say something in the following chapter.[5] These rules of law could, of course, be varied by the consent of the parties; and this variation was often accomplished by an exception or a reservation. Of these two clauses, therefore, I must say a few words.

Coke thus distinguishes an exception from a reservation: "Note a diversity between an exception (which is ever part of the thing granted, and of a thing in esse), for which *exceptis*, *salvo*, *præter*, and the like are apt words; and a reservation which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised."[6] Moreover, "the lessor cannot reserve to any other but to himself."[7] Thus a man can lease land

[1] See e.g. Bradshaw v. Eyre (1597) Cro. Eliza. 570; Worledg v. Kingswel (1598) ibid 794; Beaudely v. Brook (1605) Cro. Jac. 189; Hurleston v. Woodroffe (1618) ibid 519; Solme v. Bullock (1684) 3 Lev. 165; cf. Co. Litt. 121b; for an illustration see Bridgman, Precedents of Conveyances 18.

[2] "It was said that in the conveyance . . . there were a great number of general words put, which are unmeaning and insensible according to the strict literal rule of construing every word as passing something more than would be passed without it. . . . General words we all know are almost always, if not always, unmeaning; and you can, in fact, only lay hold of them to sometimes extend the operation of an instrument—as, for example, to easements which have become extinguished by unity of seisin or enjoyment, or in some other way. They have no operation, and the only wonder is that they have been allowed to remain so long in the conveyancers' pigeon holes to be put in every deed, when in truth they have no meaning and effect at all," Wood v. Saunders (1875) 44 L.J. Ch. at p. 520 *per* Hall, V.C., cited Goddard, Easements (5th ed.) 134 n. (*f*).

[3] For illustrations see Goddard, Easements 136-145; after a long discussion Mr. Goddard can only say, at p. 144, "it is somewhat difficult to say with any feeling of certainty what the rule of law precisely is with regard to grants of easements by general words in a deed of conveyance, when the owner of two estates, has, during the unity of ownership, been in the habit of using the one he retains as servient to the one he is conveying."

[4] 44, 45 Victoria c. 41 § 6. [5] Below 485-495. [6] Co. Litt. 47a.

[7] Ibid; but in Y.B. 3 Hy. VI. Pasch. pl. 21 this technical distinction had hardly yet been reached; the two words seem to be used almost convertibly; it would appear from Brooke, Ab. *Reservacion* pl. 46, citing the Doctor and Student, that the modern distinction had been reached by the first quarter of the sixteenth century; cp. Dyer 19a (1537).

excepting the timber, or a manor excepting a particular acre.[1] Similarly he can lease land reserving rent or other profits to arise from it; but he cannot reserve something which was parcel of the thing granted, as e.g. a right of common or other profit.[2] These were the exact technical meanings which had come to be attached to these terms; but in some cases, where the context requires it, a reservation may be construed as an exception.[3] From both an exception and a reservation must be distinguished privileges or rights, e.g. of hunting or fishing, retained by a lessor, which take effect as incorporeal rights granted by the lessee to the lessor.[4] These are not, strictly speaking, exceptions because they are not part of the thing granted. It might, however, appear at first sight that they come within Coke's definition of a reservation, in that they are things newly created out of the property demised. But, it would appear from Shepherd, that what Coke meant by this phrase was something in the nature of rent, or services which were to issue from the land, and were to be paid or performed by the tenant.[5] Obviously, if this was Coke's meaning, they cannot be regarded as reservations.

(3) *Covenants for renewal.*

In 1564, in the case of *Say v. Smith*,[6] it had been held that the requirement of certainty in the beginning, continuance, and ending of a lease for a term of years, was fatal to the validity of a proviso in a lease for ten years, that, if the rent were paid at the end of each ten years, the lessee should have a perpetual demise, "from ten years to ten years continually following and out of the memory of man." Such a lease, it was held, was good for no more than ten years. But in 1565 it was held in the case of

[1] Co. Litt. 47a; Y.B. 14 Hy. VIII. Mich. pl. 1; cp. Doe d. Douglas v. Lock (1835) 2 Ad. and E. 705.

[2] "If one grant land, yielding for rent, money, corn, a horse, spurs, a rose, or any such like thing, this is a good reservation: but if the reservation be of the grass, or of the vesture of the land, or of a common, or other profit to be taken out of the land; these reservations are void," Shepherd, Touchstone 80.

[3] "And sometime it (a reservation) hath the force of saving or excepting. So as sometime it serveth to reserve a new thing, viz. a rent; and sometime to except part of the thing in esse that is granted," Co. Litt. 143a; Coke, in making this admission, was, as his references show, relying on older cases, before the modern technical meaning, which he states at f. 47a, had been reached; this has enabled the courts in some cases to do substantial justice by not insisting too strongly on the literal meaning of the words, cp. Doe d. Douglas v. Lock (1835) 2 Ad. and E. at p. 745.

[4] Doe d. Douglas v. Lock at p. 743.

[5] "It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing," Shepherd, Touchstone 80; and cp. above n. 2; it is clear from Co. Litt. 47a that he regards a rent as the typical thing which could be reserved, and would therefore exclude any benefit, like a privilege or an easement, created once for all, see ibid 142a; below 264.

[6] Plowden 271; above 247.

Chapman v. Dalton,[1] that a lessor for twenty-one years could make a valid covenant with his lessee and his assigns, to make a new lease for twenty-one years to begin after the end of the first lease. It was decided by the House of Lords in *Bridges v. Hitchcock*[2] in 1715, that a covenant of this kind, though it was for perpetual renewal, was not void as infringing the rule against perpetuities. As Gray has pointed out, if the covenant for renewal is absolute, the decision is correct. It does not infringe the rule, because the covenant to renew "is part of the lessee's present interest. The right which the present possessor of land has to continue or drop his possession is not a right subject to a condition precedent."[3] It creates, as Jessel, M.R., said, "an equitable estate from the time of its execution."[4] But, as Mr. Cyprian Williams has pointed out,[5] this reasoning does not apply to a case where the covenant to renew is not absolute. It does not apply, for instance, to a case where the lessee's right is limited to arise, only on giving notice within a particular time, and paying a specified fine. The allowance of the validity of such a covenant for perpetual renewal is, as Jessel, M.R., said,[6] an exception from the rule against perpetuities, no doubt permitted because it was established when the rule against perpetuities was as yet young,[7] and before any one had ever realized that such covenants, in effect, created an equitable interest, to which the rule should be applied.[8] That being so, it is not surprising to find that the courts will not construe a covenant for renewal, as a covenant for perpetual renewal, unless such an intention clearly appears;[9] and that it has been decided, in accordance with the views expressed by Mr. Cyprian Williams,[10] that an option of purchase given to a lessee for years, to be exercised at a period which may infringe the rule against perpetuities, is invalid.[11]

The Obligations of the Lessee

The most important of the obligations of the lessee is the payment of rent. Of rent therefore I shall speak first. I shall then deal with certain obligations of the lessee relating to the user of the property leased. Finally I shall say something as to his duties at the termination of the lease.

[1] Plowden 286.
[2] 5 Bro. P.C. 6; see also Ross v. Worsop (1745) 1 Bro. P.C. 281.
[3] Perpetuities 194. [4] Moore v. Clench (1875) 1 C.D. at p. 452.
[5] 42 Solicitors Journal 630; and Gray agrees, Perpetuities 195.
[6] L.S.W.R. v. Gomm (1882) 20 C.D. at p. 579.
[7] Above 226-227. [8] See 42 Solicitors Journal 630.
[9] Baynham v. Guy's Hospital (1796) 3 Ves. at p. 298.
[10] 42 Solicitors Journal 628-630, 650.
[11] Woodall v. Clifton [1905] 2 Ch. at pp. 259-266 *per* Warrington, J.

(1) *Rent.*

From the very early days of the common law there have been rent-paying tenants;[1] and therefore the common law had acquired a body of doctrine as to rent service—the rent due from a tenant to his landlord—at an early date. We have seen that rent was regarded as a thing issuing from the land, recoverable by the real actions, and treated, both from the point of view of procedure, and from the point of view of the rights of the persons entitled, very much like an estate in the land;[2] and we shall see that this primitive conception of the nature of rent is the source of many of the rules of our modern law on this subject. But, in modern law, rent is not conceived of as a thing, but rather as a payment which a tenant is bound by his contract to make to his landlord for the use of the land. This idea that rent is a payment due by virtue of a contract began to make its way into the law in the cases of rents reserved on leases for years. Rents reserved on such freehold interests as leases for life were governed longer by the mediæval idea; and the mediæval idea continued to influence the rules applied to rents reserved on leases for years. But, as the conception of contract became more powerful, and as the capacity of contract for effecting the intention of the parties came to be more distinctly realized, ideas derived from this source came to be more extensively used to supplement the deficiencies in the rules as to rent, caused by the prevalence of the mediæval conception; and, in some cases, rules derived from these ideas have, in effect, superseded the older rules, or rendered them comparatively unimportant. Since the modern law has thus been developed under the influence of these two very different conceptions, it is not surprising that it is neither wholly rational nor wholly intelligible. Many of its rules are based ultimately on the mediæval conception, while others are based on the more modern ideas; and, as is the case with many other branches of the land law, the mixture of mediæval and modern has produced a complex body of very technical law.

It follows that in tracing the history of the lessee's liability for rent, it will be necessary to deal, firstly, with those rules which spring from the mediæval conception of rent as a thing issuing from the land; and, secondly, with those rules which spring from the modern idea that it is a contractual obligation to pay for the use of the land.

(i) Rules based on the mediæval conception of rent as a thing.

The nature of the actions by which a right is protected in

[1] Vol. iii 51. [2] Ibid 97, 99-101, 151-153.

early law, have not infrequently had a very permanent influence upon the nature of the right. This is very strikingly illustrated in the rules as to rent. We have seen that the landlord could sue for his rent by real actions, in which he could claim his rent, just as he could claim an estate in the land;[1] and we have seen that certain other real actions, such as *ne injuste vexes*, *de consuetudinibus et serviciis*, and *cessavit*, lay to enforce the duties of lord and tenant in relation to the payment of rent and other services.[2] In particular, it should be noted that the right to rent reserved on a freehold estate was of so "real" a kind, that the actions of debt[3] and covenant[4] did not lie for it during the continuance of the lease;[5] that this was the law till 1709;[6] and that for rent charges, to which the Act of Anne did not apply, these personal actions did not lie till after the abolition of the real actions.[7] It is true that this rule did not apply to rent reserved on a lease for years;[8] and this is significant of the part that rent, thus reserved, will play in introducing the more modern idea of rent. But it should be noted that the lessor, who let his land for a term of years, has always had the typical landlord's remedy—the right of distraint.[9] This right of distraint illustrates the close connection of rent with the land and the chattels thereon. "Into the land the rent owner enters; he takes the chattels that are found there. In such a case it is easy for us to picture the rent 'issuing out of' the land, and incumbering the land."[10]

In fact, the nature of the remedies provided by the mediæval law for the recovery of rent, and especially this right of distraint, may be said to be the basis of much of the law relating to the necessary qualities of a rent; to its assignability; to the property

[1] Vol. iii 19-20, 99-100, 151.

[2] Ibid 15-16.

[3] Ognel's Case (1587) 4 Co. Rep. at f. 49a; cp. Holmes, Common Law 391.

[4] If a person had put himself under an obligation to pay a fixed sum, even though that obligation had been created by writing under seal, the proper form of action was originally debt, vol. iii 418; later, it is true, covenant became alternative to debt, ibid; but, being only alternative, it could not be brought in cases where debt would not lie.

[5] "A man makes a lease for life rendering rent, the rent is in arrear, the lessor dies, the executors, during the life of the tenant for life, shall not have an action of debt, but after the estate for life determined, the action shall be maintainable," Ognel's Case (1587) 4 Co. Rep. at f. 49b; and this was the common law rule, see Y.BB. 10 Hy. VI. Mich. pl. 38; 19 Hy. VI. Mich. pl. 85 (p. 42); F.N.B. 121D; the remedies of the lessor's executors were improved by 32 Henry VIII. c. 37. This statute applies to rents reserved on leases for lives or in tail, Co. Litt. 162b; Hool v. Bell (1698) 1 Ld. Raym. 172; it was for some time doubted whether the statute applied to such rents, as it was thought that it was only intended to apply to cases where there was no remedy at common law, Anon. (1581) Dyer 375b; Turner v. Lee (1638) Cro. Car. 471; but Coke's view of the application of the statute has prevailed, Prescott v. Boucher (1832) 3 B. and Ad. at pp. 857-858.

[6] 8 Anne c. 14 § 4.

[7] Thomas v. Sylvester (1873) L.R. 8 Q.B. 368.

[8] Litt. § 58; Walker's Case (1587) 3 Co. Rep. at f. 22a; Co. Litt. 47b.

[9] Litt. § 58.

[10] P. and M. ii 129.

from which it can issue; to the rules as to its payment; and to the persons to whom the rent can be reserved, and to whom the right to receive it will pass, on the death of the landlord.

The necessary qualities of a rent.—It was never the law that rent must necessarily consist of a money payment. The number and variety of the arrangements, which could be effected by creating the relation of landlord and tenant in the Middle Ages, effectually prevented the growth of any such rule. Coke, therefore, could lay it down that "the rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, cummin, wheat, or other profit, that lieth in render, office, attendance, and such like, as in payment of money."[1] On the other hand, the memory of the time when the distinction between rent-paying free tenants, and villein tenants who performed labour services, was a leading distinction in the land law, has left its traces in the rule that "work days," and "corporeal service or the like," are not accounted rent within the meaning of the statute of 1541,[2] or at all.[3] Rent, therefore, was made to cover a large variety of payments or performances. But the nature of the remedies which the law provided has helped to make two conditions essential for the creation of a rent. In the first place, the landlord and tenant must each have a distinct and separate right to the rent reserved and the property demised. Thus a rent which involved the actual user by the landlord of the land, as for instance the right to take the crops growing on the land, could not be reserved. The rent must be a separate something to be "rendered" by the tenant occupying the land.[4] In the second place, the rent must be certain. "It is a maxim in law that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty. . . . And yet in some cases there may be a certainty in uncertainty, as a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath some time a greater number, and sometime a lesser number there."[5]

The assignability of a rent.—All rents were regarded as a species of property, which took them out of the category of mere choses in action,[6] and therefore out of the rule that there could

[1] Co. Litt. 142a. [2] 32 Henry VIII. c. 37. [3] Co. Litt. 162b.

[4] "A man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land, or the like, for that such be repugnant to the grant," Co. Litt. 142a, citing Y.B. 38 Hy. VI. Trin. pl. 2 (p. 38) *per* Prisot, C.J.

[5] Co. Litt. 96a; cp. Parker v. Harris (1693) 1 Salk. 262, where this rule was pushed to its extreme limit; see Halsbury, Laws of England xviii 466 n. (*n*).

[6] "It (rent) is a thing not merely in action, because it may be granted over," Co. Litt. 292b.

be no assignment of a chose in action.[1] A rent reserved on a freehold estate was part of the reversion on that estate. Naturally it could be assigned with that reversion.[2] The attornment of the tenant was necessary till 1705;[3] but we have seen that, as early as the thirteenth century, this necessity for attornment put no real obstacle in the way of such an assignment.[4] Whatever the tenant did with the land, the land was liable for the rent. The lord could distrain on it, whether in the hands of a tenant or an assignee;[5] and we have seen that the assignee of the tenant could, if thus distrained, get relief by a writ of *mesne*.[6] A rent reserved on an estate for a term of years could, as we have seen, be sued for by writ of debt;[7] and in this fact we may see a slight germ of the idea that there is something like an obligation on the tenant to pay his rent. But we have seen also that the writ of debt was as much proprietary as contractual.[8] There was therefore no difficulty in holding that the right to recover, by means of this writ, depended as much on privity of estate as on privity of contract; and that, therefore, "if the lessee grants over all his interest, the lessor may have an action of debt against the assignee, with whom there was no contract by deed. But, for as much as the rent issues out of the land, the assignee who hath the land and is privy in estate, is debtor in respect to the land. . . . So on the other side if the lessor grants over his reversion, now the contract runneth with the estate, and therefore the grantor shall not have any action for debt for rent due after his assignment, but the grantee shall have it, for the privity of contract follows the estate of the land."[9]

The property from which the rent can issue.—The requirements, both of the real actions, and the nature of the remedy by distraint, gave rise to the rule that a rent service cannot be reserved out of an incorporeal thing.[10] Coke explains this rule, which is still a rule of English law, in several places.[11] His statement in *Butt's Case*[12] brings out the principle on which it was founded very clearly. "The bargain and mutual agreement of the parties cannot charge such thing with rent which is not chargeable by the

[1] Below 520-527.
[2] See Read v. Lawnse (1562) Dyer, 212b; Co. Litt. 151b.
[3] 4 Anne c. 16 § 9. [4] Vol. iii 82. [5] Ibid 79.
[6] Ibid 16. [7] Above 263. [8] Vol. ii 368; vol. iii 425.
[9] Walker's Case (1587) 3 Co. Rep. at f. 22b; cp. Buskin v. Edmunds (1599) Cro. Eliza. 636.
[10] "Rent must be reserved out of the lands or tenements whereunto the lessor may have resort or recourse to distrain . . . , and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodies, mulcture of a mill, tithes, fairs, markets, liberties, privileges, franchises, and the like," Co. Litt. 47a.
[11] Co. Litt. 47a, 142a; Jewel's Case (1588) 5 Co. Rep. 3a.
[12] (1600) 7 Co. Rep. 23a.

law, as out of an hundred or advowson, [or] out of a fair; neither can a rent be granted or reserved of any estate of freehold out of any other hereditament which is not manurable, either in possession, reversion, or by possibility, but is *hereditamentum incorporeum*. . . . In an assize they cannot be put in view, nor can distress be taken in them."[1] Rent is regarded as a thing which, though incorporeal itself, must, by being solidly attached to visible land, be given something approaching the corporeal character demanded by the remedies of distraint and the real actions. But this reason for holding that a rent could not be reserved out of an incorporeal hereditament, did not apply to prevent the reservation of a rent by a freeholder on the demise of a term, or by a termor on a subdemise. Though the interests so created were chattel interests, these rents issued out of land, and for them the landlord could distrain;[2] and, though rent reserved out of a chattel interest was itself a chattel, for which no real action lay,[3] we have seen that, like the rent reserved on a freehold interest, it was regarded as a thing annexed to the estate in the land from which it was due, and to the estate of the landlord who was entitled to receive it.[4]

The working out of the rule that rent could not be reserved out of an incorporeal hereditament, sometimes gave rise to some nice questions, inasmuch as the line between corporeal and incorporeal hereditaments was by no means clearly drawn. There has been great discussion, for instance, whether tithes were sufficiently corporeal to admit of a rent being reserved from them;[5] and, in support of the theory that they were, it was urged, in a later case, that the tithes were a tenth part of the profits of the land, that the profits of the land were as tangible as the land itself, that they could be put in view in an assize, that ejectment lay for them, and that "they have every property of an inheritance in land, except that they lie in grant."[6] But, though there may be some question as to what things are corporeal and what are incorporeal for the purpose of this rule, once admit that a hereditament is incorporeal, and the rule laid down by Coke still holds, and holds for the same reason as he gave for it.

[1] At f. 23b. [2] Litt. § 58; cp. Butt's Case (1600) 7 Co. Rep. at f. 23b.

[3] "If a lessee for years of a carve of land grants to another a rent out of the said carve for the life of the grantee, that is a good charge during the term, if the grantee so long live . . . and in such case the grantee hath but a chattel," Butt's Case (1600) 7 Co. Rep. at f. 23a; it may be noted that, if a rent was granted out of a fee simple and a chattel interest, it would issue only out of the former, ibid; and, similarly, on a lease of land and chattels, the rent issued only out of the land, Collins v. Harding (1598) Cro. Eliza. at p. 607 *per* Popham, C.J., and the right to the whole rent followed the lessor's reversion, Dyer at f. 212b.

[4] Above 265.

[5] Dean of Windsor v. Gover (1670) 2 Wms. Saunders 302, and see the note at p. 304.

[6] Bally v. Wells (1769) 3 Wils. at p. 30.

"In distraining," said Farwell, J., in 1901,[1] "the landlord looks to the land demised and to the goods and chattels found thereon. If the demise be of an incorporeal hereditament no entry can be made on it; and, in like manner, if the goods and chattels be of an incorporeal nature, they can have no local position upon the land demised, and are incapable of seizure into the possession of the landlord. It is essential to a distress that the property distrained should be capable of physical possession."

It does not of course follow that these incorporeal things, from which no rent can issue, cannot be let. They could be leased for years, as Coke pointed out, and a good contract could be made to pay the sum stipulated for their use, which was enforceable by action of debt.[2] As we shall see, this was one of the ways in which ideas derived from the law of contract supplemented the mediæval conception of rent as a thing issuing from the land.[3] But such payments were not true rents. They were not things which could be attached to the estate of the landlord, and therefore they could not pass with a grant of the reversion.[4] But we shall see that to remedy this defect the help of the Legislature was invoked. Some of these contracts were made to run with the reversion; and thus much could be done by a properly framed covenant to give to these payments some of the characteristics of a true rent.[5]

Rules as to the payment of rent.—The rent was regarded as issuing out of the land. From this two consequences were deduced.

Firstly, it is "not due until the profits were taken by the lessee." It followed from this that it was not payable till the end of the term;[6] and, if a time was fixed for payment, the lessee had the whole of that time, up to the last moment, to make the payment.[7] But it must be paid at the time fixed. If

[1] British Mutoscope and Biograph Co. v. Homer [1901] 1 Ch. at p. 675.

[2] "But if a lease be made of them [incorporeal hereditaments] by deed for years, it may be good by way of contract to have an action of debt, but distrain the lessor cannot. Neither shall it pass with the grant of the reversion for that it is no rent incident to the reversion. But if any rent be reserved in such case upon a lease for life it is utterly void, for that in that case no action of debt doth lie," Co. Litt. 47a; presumably, as the result of 8 Anne c. 14 § 4 (above 263), the last sentence has ceased to be law.

[3] Below 273.

[4] Above n. 2.

[5] 32 Henry VIII. c. 34; below 289.

[6] "The rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee. And that is the reason that the rent so reserved is not due or payable before the day of payment incurred, because it is to be rendered and restored out of the issues and profits," Clun's Case (1614) 10 Co. Rep. at f. 128a.

[7] Hill v. Grange (1557) Plowden at p. 172; note that in Duppa v. Mayo (1669) 1 Wms. Saunders at p. 287 Hale, C.B., said, "that although the time of sunset was the time appointed by the law to demand rent, to take advantage of a condition of re-entry, and to tender it to save forfeiture, yet the rent is not due until midnight; for if a man

a time was fixed, and the lessor had a power to re-enter in case of non-payment, a payment made, either too late or too early, would be no answer to a claim by the lessor to re-enter for non-payment at the day.[1] Generally the lessor, who wishes to take advantage of such a condition of re-entry, must demand the rent on the land, "because the land is the debtor, and that is the place of demand appointed by law,"[2] unless some other place has been appointed at which the rent is to be paid.[3] But the rule was otherwise if the lessee had expressly covenanted to pay the rent—the lessee must, in this case, seek out the lessor and pay or tender the money at the day appointed.[4] It is thus clear that conceptions derived from the law of contract, have varied the old rules founded on the idea that the rent is a thing issuing from the land. As I have already noted, some of these rules as to payment and tender, which were first elaborated in connection with rent, are the basis upon which the modern rules governing these topics are founded.[5]

Secondly, as the rent was not due till the end of the appointed period, it followed that, if the lease determined before the time for payment, "no rent shall be paid, for there shall never be an apportionment in respect of part of the time."[6] Thus, if tenant for life leased for a term, and the rent was payable at Easter, and the lessor died in the last quarter before Easter, the representatives of the lessor could not recover rent for the preceding three quarters, because no rent was due till Easter, and no apportionment was allowed.[7] In equity, however, the remainderman was allowed in such a case to recover a fair remuneration for the use

seised in fee makes a lease for years, rendering rent at the feast of St. John the Baptist, upon condition of re-entry for non-payment, now the lessor, if he will take advantage of the condition, must demand it at sunset; yet if he dies after sunset, and before midnight, his *heir* shall have this rent, and not his *executors*, which proves that the rent is not due until the last minute of the natural day."

[1] Lord Cromwel v. Andrews (1583) Cro. Eliza. 15; Clun's Case (1614) 10 Co. Rep. at f. 127b; an earlier payment, though it would not operate as a good payment, would operate as a good livery of seisin of the rent, Co. Litt. 314a, and cf. vol. iii 100; but equity regarded such a payment as a good defence to any further claim to the rent by the lessor, Rockingham v. Penrice (1711) 1 P. Wms. at p. 180; on the whole subject see 1 Swanst. 345 n.; at the present day earlier payment is regarded as "an advance to the landlord, with an agreement that, on the day when the rent becomes due, such advance shall be treated as a fulfilment of the obligation to pay rent," but if the payment is made to the wrong person the right person can distrain for the rent when it becomes due, De Nicholls v. Saunders (1870) L.R. 5 C.P. 589, 594.

[2] Co. Litt. 201b; "the rent issueth out of the land, and in an assize for the rent the land shall be put in view," ibid; Crouche v. Fastolfe (1681) T. Raym. 418.

[3] Ibid 202a; Boroughe's Case (1596) 4 Co. Rep. at f. 73a.

[4] Haldane v. Johnson (1853) 8 Exch. at p. 694 *per* Martin, B.—thus assimilating, in this respect, the payment of rent imposed by an express covenant, to a payment to a stranger (which was not a true rent, below 271) imposed by a special condition, see Litt. § 345.

[5] Vol. ii 590 n. 4.

[6] Clun's Case (1614) 10 Co. Rep. at f. 128a.

[7] Ibid.

and occupation of the property between the death and the next quarter day.[1] This inconvenient rule, that no apportionment of rent was allowed, was applied in the Middle Ages to those pensions and annuities which partook of the nature of rents;[2] and it was partly for this reason that it was extended to all periodical payments.[3] In so far as this was the reason for the extension of the rule to all periodical payments, it is clear that the lawyers had lost sight of its original basis. But this was not the sole reason for its extension. Its extension was due in great part to the idea, which appears in the Year Books,[4] that if a man had put himself by a single contract under a single obligation to do a series of acts, there could be no obligation to pay till all the acts had been done; so that if the contract ended without the default of the parties to it, before the acts were done, no payment was due.[5] In other words, this rule could be justified, not only on the old idea which regarded the rent as a thing issuing from the land, but on the newer idea which regarded the obligation to pay rent as depending on a contractual obligation. And this newer idea made for a stricter enforcement of the rule than the older idea. Indeed the rules as to rent were, from this point of view, contrasted with the rule as to money due under a contract. "If," says Coke,[6] "I am bound to you by a bond of £20 to be paid at four usual feasts of the year by equal portions, the obligee shall not have an action of debt before all the terms incurred; the same law of a contract: but if a rent is reserved on a lease for years at four usual feasts of the year, the lessor shall have an action of debt after the first day,[7] and shall not stay till the whole is due, because it is accounted in law as a reservation of parcel of the issues and profits of the land, which is no debt before the day, as in the said case of a bond or contract." We shall see that this idea, that the unity of an obligation or a condition prevented apportionment, had something to do with the manner in which the courts in *Dumpor's Case*,[8] interpreted any attempted waiver of a condition in a lease.[9]

But it soon became clear that the rule that there could be no apportionment of rent, even though it was less rigid than the rules applied to the apportionment of money due under a contract,

[1] Jenner v. Morgan (1717) 1 P. Wms. at p. 393; but, as was clearly laid down in this case, equity followed the law and refused to "apportion rent in point of time"; see ex parte Smyth 1 Swanst. 343 n.

[2] Clun's Case (1614) 10 Co. Rep. at f. 128b; vol. iii 152-153.

[3] 1 Swanst. 337 n. and cases there cited.

[4] Y.BB. 10 Hy. VI. Mich. pl. 78; 49 Hy. VI. Mich. pl. 23; Brooke Ab. *Apporcionement* pl. 26, 27 Ed. III.; cf. Y.B. 9 Ed. IV. Pasch. pl. 1 *per* Catesby.

[5] This double origin of the rule against apportionment is indicated in the notes to ex parte Smyth, 1 Swanst. 357 n.

[6] Clun's Case (1614) 10 Co. Rep. at f. 128b.

[7] I.e. quarter day.

[8] (1603) 4 Co. Rep. 119b.

[9] Below 282-284.

would work gross injustice unless it was modified. Coke could cite mediæval authority for divers modifications in various cases which had come before the courts in the Middle Ages. He approved of and restated these modifications in his commentary on Littleton. They therefore became part of our modern law. Thus if the reversion was severed,[1] or the lessee surrendered part of the premises to the lessor,[2] or the lessor entered lawfully on part of the land,[3] or the lessee was evicted from part of the land by title paramount,[4] the rent was apportioned. If however the lessee was evicted from the whole of the property by a person claiming by title paramount,[5] or from the whole or part of the property by the fault of the lessor,[6] or if an adverse possessor was in occupation of part of the property, so that the lessee could not get possession of the whole property leased,[7] the old rule prevailed—the rent was not apportioned, and the lessor could not distrain for any part of the rent reserved. We can see a good illustration of the application of this rule, and of the principle upon which it was originally based, in the decision that if a rent be reserved for land and chattels, and the lessee is wrongfully evicted from the land, the rent cannot be demanded for the chattels, because it issues from the land.[8]

The admission of these modifications made the rules on this subject complicated; and even with these modifications the rule worked considerable injustice, not only in respect to rent, but also in respect to other periodical payments. The Legislature made several half hearted attempts to modify its results, without much effect.[9] At length in 1870[10] it adopted the right principle. It swept away the common law rule against apportionment, by enacting that rents and other periodical payments should accrue due from day to day, and should be apportionable in respect of time accordingly.

[1] Co. Litt. 148a; though there was an opinion to the contrary in 1553, ibid.
[2] Ibid 148b. [3] Ibid. [4] Ibid.
[5] Emott v. Cole (1592) Cro. Eliza. 255; cf. Co. Litt. 148a.
[6] "If the lessor enter upon the lessee for life or years into part, and thereof disseise or put out the lessee, the rent is suspended in the whole, and shall not be apportioned in any part. And when our books speak of any apportionment in case where the lessor enters upon the lessee in part, they are to be understood when the lessor enters lawfully," ibid 148b; cf. Y.B. 9 Ed. IV. Pasch. pl. 1 *per* Catesby.
[7] It had been laid down in Smith v. Stapleton (1573) Plowden at p. 432 that, if a man, having leased to A, leases the same land to B, the second lease is void; it follows that if a lease to B comprises some land already leased to A, and if the rent issues out of the whole land, the fact that B cannot get possession of the whole will defeat the lessor's claim to distrain for the rent, Neale v. Mackenzie (1836) 1 M. and W. at pp. 760-763.
[8] See Richards le Taverner's Case (1544) Dyer 56a; Emott v. Cole, ibid 212b *note;* Collins v. Harding (1598) Cro. Eliza. at p. 607.
[9] 11 George II. c. 19 § 15; 4, 5 William IV. c. 22 §§ 1 and 2.
[10] 33, 34 Victoria c. 35.

The persons to whom the rent can be reserved, and to whom the right to receive it will pass, on the death of the landlord.— A rent service could no more be reserved to any other than the feoffor than the benefit of a condition. "No rent (which is properly said a rent) may be reserved upon any feoffment gift or lease, but only to the feoffor or to the donor or to the lessor or to their heirs; and in no manner it may be reserved to any strange person."[1] Thus when a father was seised in fee, and he and his son and heir leased land for years to begin after the father's death, and rent was reserved to the son, it was held that the reservation was void.[2]

The difference between rents reserved by lessors who had a freehold interest in land, and rents reserved by lessors who had only a chattel interest, caused some difficulties in the devolution, on the death of the lessor, of the right to receive these rents. It followed from the rule that the rent could only be reserved to the feoffor or donor, that the right to receive the rent followed the reversion. Hence, if nothing was said, and the rent was simply reserved during the term, "the law made the distribution."[3] As Hale said,[4] "A reservation is but a return of somewhat back in retribution of what passes, and therefore must be carried over to the party which should have succeeded in the estate if no lease had been made." Thus, "if tenant in fee makes a lease, and reserves the rent to him and his executors, the rent cannot go to them, for there is no testamentary estate. On the other side, if lessee for 100 years should make a lease for 40 years, reserving rent to him and his heirs, that would be void to the heir." In fact it was much the safest course to allow the law to make the distribution, as the intentions of lessors were apt to be frustrated if they made limitations which were legally impossible. Thus, to take some of the illustrations given by Coke, if a tenant in fee simple reserved a rent to him and his assigns the rent determined by his death, as the reservation was good only during his life;[5] or if he reserved a rent to him and his executors, it ended by his death, because the heir had the reversion to which the rent was incident.[6]

We must now turn to the process by which these rules were

[1] Litt. § 346; so Coke says, "Note it is a maxim in law that the rent must be reserved to him from whom the state of the land moveth, and not to a stranger," Co. Litt. f. 143b.

[2] Oates v. Frith (1615) Hob. 130.

[3] "It was agreed that the most clear and sure way was to reserve rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person," Whitlock's Case (1609) 8 Co. Rep. at f. 71a.

[4] Sacheverel v. Frogate (1671) 1 Ventr. at p. 161; for an example of the application of this principle see Drake v. Munday (1631) Cro. Car. 207.

[5] Co. Litt. 47a; cp. cases cited 2 Rolle's Ab. 450, 451. [6] Ibid.

added to and varied by the newer conception that rent is based upon a contract.

(ii) Rules based upon the more modern conception that rent is a contractual obligation to pay for the use of the land.

We have seen that, till 1709, no action of debt or covenant could be brought for a rent reserved on the grant of an estate of freehold or inheritance;[1] and it was not till 1738[2] that assumpsit lay for rent due on a lease for years not made by deed.[3] But, if the lease had determined, so that the rent had ceased to exist, debt lay for arrears which had accrued due;[4] and debt always lay for the rent reserved on an estate for years. These rules showed that a lease for years involved, not only a conveyance of property, but also the formation of a contract—"in every lease for years there is a contract between lessor and lessee."[5] In fact, as Coke truly points out,[6] the elements of conveyance and contract, existing in the relation of lessor and lessee, cause the establishment between them both of privity of contract and privity of estate. Hence, if a lessee assigned over his estate, though privity of estate ceased, privity of contract remained. The lessee was not allowed to destroy by his own act this privity of contract, and so to escape his personal liability to the lessor. In such a case, therefore, the lessor got an alternative remedy, either against the lessee by reason of privity of contract, or against the assignee by reason of the privity of estate.[7] On the other hand, if the lessor assigned his reversion, he had destroyed the privity of contract by his own act, and could no longer hold the lessee liable. Therefore the lessee was only liable to the assignee by reason of the privity of estate created by the assignment.[8] Hence it followed that, if a lessor assigned his reversion, and then the lessee assigned his term, the assignee of the reversion could not sue the lessee, because there

[1] Above 263.

[2] 11 George II. c. 19 § 14; for the history of this doctrine and its modifications see Ames, Lectures on Legal History 167-171.

[3] See Reade v. Johnson (1591) Cro. Eliza. 242, where the plaintiff was non-suited because he brought assumpsit instead of debt.

[4] Ognel's Case (1587) 4 Co. Rep. at f. 49b; above 263 n. 5.

[5] Walker's Case (1587) 3 Co. Rep. at f. 22b.

[6] Ibid at f. 23a.

[7] "Privity of contract only, is personal privity, and extends only to the person of the lessor and to the person of the lessee, as in the case at Bar, when the lessee assigned over his interest, notwithstanding his assignment the privity of contract remained between them, although the privity of estate be removed by the act of the lessee himself"—otherwise the lessee "might prevent by his own act such remedy which the lessor has against him by his own contract," or from malice he might assign to a poor man who would let the land lie fresh so that distraint was useless, ibid.

[8] "When the lessor grants over his reversion, then, against his own grant, he cannot have remedy, because he hath granted the reversion to another, to which the rent is incident," ibid; the rule was otherwise in the case of express covenants, below 291-292.

was no longer either privity of contract or privity of estate existing between them.[1]

The statute of 1709, which allowed a personal action for rent,[2] naturally tended to emphasize the contractual aspect of rent. But, long before the passing of that statute, the conception of contract had been invoked, to get rid of the hardship which would have been produced, by following out literally and logically the conception that rent was a thing issuing from the land. Thus, in the first place, the rule that rent could not be reserved out of incorporeal things, could be evaded by the process of making a contract to pay for the user of these incorporeal things; for, in that case, though the lessor did not get a true rent for which he could distrain, the agreement to pay was "good by way of contract," and supported an action of debt.[3] In the second place, a good contract could be made to pay for use and occupation, which was enforceable by action of assumpsit.[4] In the third place, the rule that the rent must be made payable to the feoffor or donor could be similarly evaded. "If," said Hale, C.J., "I make a lease for years reserving rent to a stranger, an action of covenant will lie by the party to pay the rent to the stranger."[5]

In these cases the conception of contract tended to liberalize the rules relating to rent. But, in at least two cases, this conception tended to confirm, and even to make more rigid, some of the ideas involved in the older conception. I have already explained how this occurred in the rules relating to apportionment of rent;[6] and, just as the mediæval view that a rent was not apportionable was strengthened by ideas derived from the law of contract, so the idea that the lessee is absolutely liable to pay the rent reserved was similarly strengthened. It is clear that the mere fact that the premises had been rendered unprofitable, e.g. by warlike operations, was no answer to a writ of *cessavit* brought by the landlord.[7] Still less was it any answer to a writ of debt, in which the contractual nature of the lessee's obligation was emphasized; for, though a man might be excused from a statutory penalty if damage occurred through the act of God, he was not excused from the obligation which he had imposed on himself by his own

[1] Humble v. Glover (1594) Cro. Eliza. 328; cp. Walker's Case (1587) 3 Co. Rep. at f. 23b.

[2] Above 263.

[3] Co. Litt. 47a, cited above 267 n. 2.

[4] Dartnal v. Morgan (1621) Cro. Jac. 598.

[5] Deering v. Farrington (1674) 1 Mod. at p. 113.

[6] Above 268-269.

[7] Y.B. 9 Ed. III. Pasch. pl. 30, from which it appears that the commonalty of the county of Northumberland, whose lands had been wasted by the Scotch, had been obliged to get the king's command to stay process on writs of cessavit brought by their landlords.

covenant.[1] The lessee, therefore, is bound by his contract; so that, whatever happens to the land or premises, he must pay his rent. "When the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his own contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question, but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement . . .; this reservation then, being a covenant in law, and whereupon an action of covenant hath been maintained (as Roll said) it is all one as if there had been an actual covenant."[2] Indeed, just as the older rules against apportionment were less severe than the later rule based on the unity of the contractual obligation; so the older rules as to the character of lessee's liability for rent, which admitted occasionally a modification of that liability, were, in the opinion of some, less severe than the later rules founded on the view that a man must be bound by the contract which he has made.[3]

The only mitigations allowed to the lessee's liability were in the cases where the lessor had himself evicted the lessee from the whole or a part of the premises,[4] or where the lessee had been evicted from the whole of the premises by some one claiming by title paramount to that of the lessor.[5] In these cases the rent was suspended during the continuance of the eviction;[6] and, as we have seen, if the lessee was evicted from part of the land by some one claiming by title paramount, the rent was apportioned.[7] The authorities cited by Coke[8] show that these mitigations of the lessee's liability had been established in the Middle Ages. They were obviously fair; and since they were as applicable to the

[1] Anon. (1537) Dyer 33a; cp. Y.BB. 40 Ed. III. Hil. pl. 11 (p. 6) *per* Finchden; 49 Ed. III. Hil. pl. 1; though it was otherwise if the performance was obviously from the first impossible, Y.BB. 40 Ed. III. Hil. pl. 11 (p. 6) *per* Finchden; 14 Hy. VIII. Pasch. pl. 7 (p. 28) *per* Pollard.

[2] Paradine v. Jane (1647) Aleyn at p. 27; the judges attempted to rationalize the rule by adding the additional reason, "that, as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor"; we have seen that in the case of Harrison v. Lord North (1667) 1 Ch. Cas. 83, a plaintiff sought to be relieved by equity from liability to pay rent incurred during the time that his house was used as a hospital by the soldiers of the Parliament, vol. vi 659-660; the chancellor said he would relieve if he could, but no decision is reported.

[3] Richards le Taverner's Case (1544) Dyer 56a; 1 Rolle, Ab. 236.

[4] Co. Litt. 148b, cited above 270 n. 6.

[5] Above 260 n. 5.

[6] See Birch v. Wright (1786) 1 T.R. 378.

[7] Above 270.

[8] Co. Litt. 148a, 148b.

mediæval conception of rent as a thing issuing from the land, as to the later idea of rent as depending upon a contract between lessor and lessee, they have become part of our modern law.

Thus, in our modern law as to the lessee's liability for rent, we may see many traces of the way in which the dominant mediæval conception of a rent, as a thing issuing from the land, gave birth, under the pressure of the real actions, to definite and detailed rules. The real actions are things of the past; but they have, as we have seen, created our modern "real property,"[1] and shaped many of its existing rules. But in this chapter we have seen also that these rules have been added to and supplemented by the new ideas which were introduced into the law during this period. In some branches of the law of real property the mediæval rules, shaped by the real actions, have had a larger, and in some a smaller influence on the modern law. In this particular branch of the law the mediæval rules have had a large influence, because, owing to the importance of the part played by rents in mediæval economy,[2] the rules relating to them were numerous and detailed. These rules are the basis of our modern law; and, though they have been supplemented by ideas drawn from that contractual conception, which was tending all through this period to supersede the typical mediæval device of granting a rent or other incorporeal *res*,[3] they have influenced, and have sometimes even been reinforced and extended, by the newer ideas which put the lessee's liability to pay rent on a contractual basis.

(2) *Certain obligations relating to the user of the property leased.*

The most important of these obligations—obligations to repair, to pay rates and taxes, and to insure, are generally the subject of special covenants in the lease; and the construction of these covenants has given rise to many complex rules. With these matters I do not propose to deal. All that I shall attempt to do is to give some account of the lessee's liability for waste; of conditions or covenants against assignment or under-letting; and of the rule laid down in *Dumpor's Case*[4] as to the waiver and apportionment of conditions.

(i) Liability for waste.

We have seen that, during the mediæval period, statutes of 1267, 1278, 1292, and 1433 had imposed a liability for waste upon lessees for life and years; that certain rules had been laid down as to the nature of the acts which constituted waste; and that it had been settled that a landlord could lease his land without

[1] Vol. iii 4-5, 29.
[2] See vol. ii 355-356; vol. iii 151-153.
[3] Ibid 454.
[4] (1603) 4 Co. Rep. 119b.

impeachment of waste.[1] During this period the law as to what acts would constitute waste was developed on the lines marked out by the mediæval decisions. The cases afford many examples; and, in particular, there are many cases turning on waste committed by cutting timber and opening mines.[2] The main developments which took place in this branch of the law are concerned with the liability of tenants for permissive waste, and for meliorative waste; with the development by equity of the law as to waste; and with changes in the procedure by which landlords enforced liability for waste.

Permissive waste.—We have seen that the mediæval statutes, which regulated waste, left it somewhat uncertain whether or not a lessee for life or years was liable for permissive waste.[3] Most of the cases seem to postulate some positive act of voluntary waste; and to require the commission of a positive wrongful act was in harmony with the mediæval principles of liability for wrongdoing.[4] But Coke, in his comment on the statute of Marlborough, committed himself to the statement that "to do or make waste, in legal understanding, includes as well permissive waste, which is waste by reason of omission . . . as waste by reason of commission."[5] As Coke had explained that the statute applied both to tenants for life and to tenants for years,[6] he clearly meant that both these sorts of tenants were liable for permissive waste; and Blackstone so stated the law.[7] But in the early part of the nineteenth century doubts began to be expressed. It had been recognized in 1600, in the *Countess of Shrewsbury's Case*, that a tenant at will was not liable in an action of waste brought on the statute of Gloucester;[8] and later cases recognized that he was not liable to an action on the case for permissive waste.[9] On the other hand, Coke had laid it down that a tenant from year to year was liable under the statute of Gloucester.[10] It followed, therefore, that he was liable for per-

[1] Vol. ii 248-249; vol. iii 121-123.

[2] The earlier cases are summarized in Co. Litt. 53a-54b; and both the earlier and the later cases in 2 Rolle Ab. 814-824; see Bl. Comm. ii 281-282.

[3] Vol. iii 122-123. [4] Ibid 375-377.

[5] Second Instit. 145; and for this he had authority, Anon. (1569) Dyer 281b.

[6] "Here firmarii (the word used in the statute of Marlborough c. 24) do comprehend all such as hold by lease for life or lives or for years by deed or without deed," ibid.

[7] "For above five hundred years past all tenants for life or for any less estate, have been punishable or liable to be impeached for waste both voluntary and permissive," Comm. ii 283; but note that the statutes do not apply to tenants at will, see next note.

[8] 5 Co. Rep. 13b; S.C. Cro. Eliza. 777; Panton v. Isham (1694) 3 Lev. 398; but if he commits voluntary waste the lessor can terminate the tenancy and bring trespass, 5 Co. Rep. at f. 13b.

[9] Note 7 to Pomfret v. Ricroft 1 Wms. Saunders 323; Gibson v. Wells (1805) 1 Bos. and Pul. N.R. 290.

[10] Second Instit. 302.

missive waste. But in 1813, in the case of *Herne v. Bembow*,[1] and in 1817, in the case of *Jones v. Hill*,[2] it was held that case would not lie against a lessee from year to year, or a lessee for years, for permissive waste. As the *Countess of Shrewsbury's Case* was relied on by the court in *Herne v. Bembow*, the court was obviously extending (quite without authority) the rule applicable to tenants at will to tenants from year to year, and to lessees for years.

Other cases, on the other hand, following the older authorities, asserted that such tenants were liable;[3] and this would certainly seem to be the better opinion; but, the law being thus doubtful, equity will not issue an injunction to restrain permissive waste.[4] Meanwhile, in consequence probably of these doubts as to the liability of a lessee for years, it came to be thought that a tenant for life was not liable for permissive waste; and this view was upheld by Kay, J., in 1889.[5] The result of this departure from the older principle laid down by Coke, which, as I have said, probably arose from a misunderstanding of the principles applicable to tenants at will, has been to leave the liability of the lessee for years for permissive waste somewhat doubtful, and to negative the liability of the lessee for life. In fact, the distinction between lessees for life and lessees for years in respect of this liability is quite without foundation in history or in principle. It can only be explained, as Williams has suggested,[6] by the fact that, in modern times, lessees for life are usually tenants holding under a settlement, i.e. persons who would be the owners of the property, but for the system of settlement; while lessees for years are usually in the position of farmers.

Meliorative waste.—The common law held strictly to the view that any act which altered the character of the property was waste, even though it raised its value—"if a tenant build a new house it is waste, and if he suffer it to be wasted it is a new waste."[7] This view was rigidly adhered to in the seventeenth century. Thus, in the case of *Cole v. Green*,[8] the conversion of a brewhouse into a

[1] 4 Taunt. 764. [2] 7 Taunt. 392.

[3] Harnett v. Maitland (1847) 16 M. and W. 257; Yellowby v. Gower (1855) 11 Exch. at p. 294 *per* Parke, B.; Davies v. Davies (1888) 38 C.D. 499.

[4] Ashburner, Equity 491 492.

[5] Re Cartwright 41 C.D. 532; note that Kay, J., relied chiefly on the cases of Gibson v. Wells, Herne v. Bembow, and Jones v. Hill.

[6] Real Property (22nd ed.) 520 n. (*n*).

[7] Co. Litt. 53a; cp. Maleverer v. Spinke (1538) Dyer at f. 36b; vol. iii 123.

[8] (1671) 3 Lev. 309; 2 Wms. Saunders 259; see also City of London v. Greyme (1607) Cro. Jac. 182; Lord Darcy v. Askwith (1618) Hob. 234; as Ashburner, Equity 494, has very truly said, "in the seventeenth century, the common law judges treated all acts which had previously been judged to be waste, not as mere illustrations of a general principle, but as necessarily waste, even though they improved the inheritance instead of injuring it"; as is there pointed out, this point of view is emphasized in Simmons v. Norton (1831) 7 Bing. 640.

number of small tenements, which raised the rental of the property from £120 to £200 a year, was held by Hale, C.J., to be waste. But, in more recent times, the common law has ceased to look merely at the act done, and has begun to pay more attention to its consequences. As early as Charles I.'s reign, Richardson, C.J., had laid it down that "the law will not allow that to be waste which is not any ways prejudicial to the inheritance."[1] In 1833 Lord Denman emphasized this view, and laid down the broad rule, which was substantially in harmony with the view always held by equity, that no act can be regarded as waste which cannot be proved by the plaintiff to have injured the inheritance;[2] and equity has always refused to issue an injunction against waste of a trivial nature, and, a fortiori, against meliorative waste.[3]

Equitable developments of law as to waste.—On the basis of the common law doctrines as to waste, the court of Chancery erected a considerable superstructure of equitable rules.[4] These rules concerned chiefly tenants holding limited interests under settlements; but some of them affected all tenants. They may, I think, be said to have affected the legal rules in three main directions. Firstly, equity followed the law and applied the legal rules applicable to legal estates to equitable estates.[5] Secondly, equity laid down rules as to the power of the tenant to deal with the property which sometimes enlarged, and sometimes restricted his legal powers. It enlarged his powers, in that it allowed a tenant for life under a settlement to cut ripe timber, the proceeds being held on trust, as to the income for the tenant for life, and as to the capital to the first tenant for life without impeachment of waste.[6] It restricted his powers in that, from an early date, it restrained a tenant unimpeachable from waste from making an inequitable use of his powers;[7] and, as the result of this interference, it created and developed the conception of equitable waste.[8] Thirdly, we shall see that the old common law action for waste was very defective.[9] Equity not only gave a better

[1] Barret v. Barret Het. at p. 35.

[2] "There is no authority for saying that any act can be waste which is not injurious to the inheritance, either first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or thirdly by impairing the evidence of title," Doe d. Grubb v. Burlington (1833) 5 B. and Ad. at p. 517; Ashburner, op. cit. 493.

[3] Mollineux v. Powell (1730) 3 P. Wms. 268 note (2), *per* King, L.C.; Doherty v. Allman (1878) 3 A.C. at p. 723; Meux v. Cobley [1892] 2 Ch. 253.

[4] See generally Ashburner, Equity 490-507.

[5] Aspinwall v. Leigh (1690) 2 Vern. 218—the court gave an equitable tenant for life unimpeachable for waste, subject to preceding trusts to pay debts, leave to cut timber and sell it for his support; cp. Ashburner, op. cit. 496.

[6] Waldo v. Waldo (1841) 12 Sim. 107; a case which, in substance, followed the principle applied by Lord Hardwicke in Garth v. Cotton (1753) 3 Atk. 751 at p. 758.

[7] See note to Tracy v. Tracy (1681) 1 Vern. 23; Vane v. Lord Barnard (1716) 2 Vern. 738.

[8] Ashburner, Equity 501-505.

[9] Below 279.

remedy—injunction, but also gave the remedy to persons who would not have been entitled to the action at common law.[1] As we shall now see, this particular interference by equity helped to induce the common law to supersede the old action for waste by an action on the case.

Procedural changes.—The action of waste introduced by the statute of Gloucester had some affinities to, and some of the same defects as, the assize of nuisance.[2] Just as the assize of nuisance was in a manner supplementary to assize of novel disseisin, so the action of waste was in a manner supplementary to the real actions which lay to enforce the rights and duties of landlord and tenant. Just as the assize of nuisance lay only for or against freeholders, so the writ of waste was confined to remedying waste which tended to the disinherison of a lessor; so that it only lay for a lessor who had an estate of inheritance.[3] We shall see that the defects in the writ of waste, like the defects in the assize of nuisance, led to the substitution of actions on the case for these older remedies.[4] The writ of waste, also, had an affinity with the real actions in that a successful plaintiff not only got three-fold damages, but also recovered the place wasted.[5]

The fact that the place wasted was recovered, and that the waste must be shown to be to the disinheritance of the person next entitled, gave rise to the rule that the only person who could sue, was the person entitled to the estate of inheritance immediately depending upon the estate of the tenant against whom the action was brought. So that if land was given to A for life, remainder to B for life, remainder to C and his heirs, and A committed waste, B could not sue because he had no estate of inheritance, and C would not sue because his estate of inheritance was not immediately depending upon the estate of A.[6] It is true that C could sue when B's estate determined; but only if he was still alive; for the person bringing the action must have an estate of inheritance in him at the time when the waste was committed; so that, if C had died when B's estate determined, C's heir could not sue.[7] Moreover, any alteration in the reversionary interest, e.g. if the reversioner parted with or resettled his estate, would bar the action of waste.[8]

[1] Below 280.
[2] Vol. iii 11.
[3] Co. Litt. 53b; Udal v. Udal (1648) Aleyn 81.
[4] Below 280.
[5] Coke, Second Instit. 303-304; there could of course be no recovery if the lease had expired; the action was then brought for the three-fold damages; in this case the action was brought in the *tenuit*, but if the lease was still subsisting it was said to be brought in the *tenet*, 2 Wms. Saunders 252 n.
[6] See the authorities collected ibid.
[7] Coke, Second Instit. 305.
[8] Co. Litt. 53b—"Note after waste done there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done, for if after the waste he granteth it over, though he taketh back the whole estate again, yet is the waste dispunishable."

As early as the reign of Richard II. the court of Chancery had intervened to remedy some of these defects. For instance, if land was limited to A for life, remainder to B for life, remainder over in fee, the court of Chancery would issue an injunction at the suit of B.[1] In *Roswell's Case*, in 1619,[2] it was laid down that equity would always act in this way in such a case; and this jurisdiction was recognized in 1677 in the case of *Skelton v. Skelton*.[3] It was doubtless the attitude of the court of Chancery which induced the courts of common law to remedy some of the defects of the old action of waste, by allowing actions on the case in the nature of waste. In the case of *Jeremy v. Lowgar*,[4] in 1596, such an action was brought by a tenant for life against a lessee for years who had burnt the house. The court thought that the action lay, because the tenant for life was answerable over to the lessor in an action of waste; and it is clear that other actions of this kind were being brought at this period.[5] But, for some time, the courts were disinclined to extend the scope of this action. The argument against allowing it was that no such action lay at common law, that the statute of Gloucester had given it only in certain cases, and that it was the landlord's own fault if he did not guard himself by making a covenant.[6] This argument was put forward in *Jeremy v. Lowgar;*[7] and in *Jefferson v. Jefferson*[8] it secured the support of Windham and Charlton, JJ.;[9] but Pemberton, C.J., and Levinz, J., held that "he in reversion might waive his action of waste at this day, and take his remedy by action upon the case";[10] and this view has prevailed.[11] As in the case of the action of ejectment,[12] so in the action on the case for waste, the newer action borrowed one or two of the characteristics of the old action,[13] and was adapted so successfully to the needs of landlords and tenants, that the old

[1] Egerton cited such a case in 1599, and said that the decree was made by the advice of the judges, Moore 554 pl. 748.

[2] 1 Rolle Ab. 377.

[3] 2 Swanst. 170 n., 171, 172.

[4] Cro. Eliza. 461.*

[5] See the cases cited in the argument in Countess of Salop v. Crompton (1600) Cro. Eliza. 777.

[6] Coke gave currency to this argument, Second Instit. 145, 299, which was repeated by Blackstone, Comm. ii 282-283, and in many seventeenth and eighteenth century cases.

[7] 1596 Cro. Eliza. 461.

[8] (1682) 3 Lev. 128.

[9] At p. 131.

[10] Ibid.

[11] 2 Wms. Saunders 252 note to Greene v. Cole; see Woodhouse v. Walker (1880) 5 Q.B.D. at pp. 405-407 for a good account by Lush, J., of the history of the remedies for waste.

[12] Above 16-19.

[13] Thus it was held in Eacon v. Smith (1841) 1 Q.B. 345 that the rule laid down by Coke, "that there is a special regard to be had to the continuance of the reversion in the same state that it was at the time of the waste done," above 279 n. 8, applies to the action on the case; so that, when the plaintiff had no vested estate at the time of the waste committed, he could not sue.

action dropped out of use, and was abolished in 1833 with the other real actions.[1] Thus, at the present day, the remedy for waste is an action for damages, supplemented where necessary by the equitable remedy of injunction.

(ii) Conditions and covenants against assignment or under-letting.

We have seen that the common law has always endeavoured to maintain freedom of alienation; and that, with this object in view, it has declared to be void any attempts to prevent a tenant in fee simple from alienating his fee, or a tenant in tail from barring his entail.[2] But the imposition of a restraint upon the power of a tenant for life or years to assign or under-let was a different matter. As the rules against waste proved, these tenants had not complete freedom of disposition; and it is quite clear that the relation of landlord and tenant, and the exigencies of estate management, make the power to impose some sort of restraint desirable. The dicta in the Year Book cases had left the law on this point by no means clear. These cases were often concerned with the case of tenants in tail; and no very certain rule could be deduced from them.[3] The modern law, partly deduced from these cases, and partly resting upon grounds of public policy, was laid down by Coke in *Mildmay's Case*.[4] "If a man makes a gift in tail, on condition that he shall not make a lease for his own life, it is void and repugnant; but if a man makes lease for life or years, on condition that he shall not alien or lease the lands, it is good. For at the common law, lessee for life or years might commit waste, which was *ad exhæreditationem* of the lessor, and therefore there was a confidence betwixt the lessor and lessee, and therefore the lessor might restrain the lessee from aliening or demising to another, in whom perhaps the lessor had not such confidence. And therefore it is reasonable that when he who has the inheritance makes a lease for life or years, that he may restrain such particular tenants from aliening or demising for the benefit of his inheritance."

Coke also laid it down that, though such a condition was

[1] 3, 4 William IV. c. 27 § 36. [2] Vol. iii 85; above 205-209.

[3] In Y.B. 21 Hy. VI. Hil. pl. 21 Paston, J., thought that such a condition was bad, and compared it to the grant of an estate in fee simple with a condition against alienation; but others thought that it was good, and compared it to the grant of a fee tail with a condition against discontinuing; in Y.B. 8 Hy. VII. Hil. pl. 3 Huse and Fairfax thought the condition good; in Y.B. 11 Hy. VII. Mich. pl. 25 a condition that neither tenant in tail nor his heirs should alien in fee was held good; Y.B. 13 Hy. VII. Pasch. pl. 9 was a case of an estate tail, but Fineux at p. 23, and Townshend and Vavisor at p. 24, agreed that a condition against alienation, attached to an estate for life was good, though Brian dissented at p. 23.

[4] (1606) 6 Co. Rep. at f. 43a; the view expressed in Stukely v. Butler (1615) Hob. at p. 170, that if a lease was made to one and his assigns no condition against assignment was possible, has not been followed, see 1 Smith, Leading Cases (10th ed.) 48.

lawful, yet a grant made in breach of it was valid.[1] After some conflict of opinion this view has prevailed;[2] and later cases have defined the sort of acts which amount to the breach of various covenants of this kind.[3] After considerable conflict of opinion, it has also been settled that the operation of such a condition is restricted to assignments made by the lessee,[4] so that it does not apply when the property passes by operation of law, for instance on death or on bankruptcy.

(iii) Waiver and apportionment of conditions.

It was in connection with these conditions against assignment, that the following rules were laid down in *Dumpor's Case* in 1603:[4] firstly, a licence given by a lessor to assign determines the condition, so that the assignee can alienate freely. Secondly, a licence given to assign part of the property demised, or an assignment of the reversion of part of the property, destroys the condition as to the whole of the property; because, though a condition can be apportioned by act in law, or by the actual wrong of the lessee, it can not be apportioned by the act of the parties. The same principle was applied to an actual waiver of the breach of a condition or covenant. Such a waiver destroyed the whole condition or covenant, and therefore prevented the lessor from complaining of any future breaches.[6]

This state of the law was often criticized;[7] but the rules laid

[1] "If a man make a lease for life or years upon condition that they shall not grant over their estate, or let the land to others; this is good, and yet the grant or lease should be lawful," Co. Litt. 223b.

[2] In Paul v. Nurse (1828) 8 B. and C. at p. 488 Holroyd, J., expressed the view that the assignment made in breach of such a covenant was void; but the contrary was laid down by Blackburn, J., in Williams v. Earle (1868) L.R. 3 Q.B. at p. 750.

[3] See Halsbury, Laws of England xviii 576-577.

[4] This question gave rise to a difference of opinion among the judges in 1583, 1 And. at p. 124; three judges thought that descent to an administrator, on the death of the lessee intestate, was a breach of a covenant not to assign; but one judge thought not, any more than if the lease was forfeited for outlawry, or taken in execution—thus agreeing with Parry v. Harbert (1540) Dyer 45b; he was, however, prepared to agree that descent to an executor, who was appointed by the party, might be a breach; this was in accordance with the view that a devise was a breach of the covenant Parry v. Harbert, *ubi. sup.*, and Windsor v. Burry, ibid n. 3; but these cases are now overruled, Fox v. Swann (1655) Style 482, Crusoe d. Blencowe v. Bugby (1771) 3 Wils. at p. 237; and the law is now settled that none of these involuntary assignments are breaches, Goring v. Warner (1724) 2 Eq. Cas. Ab. 100 pl. 3—bankruptcy; Doe d. Mitchinson v. Carter (1798) 8 T.R. 57—execution under a judgment; Seers v. Hind (1791) 1 Ves. 294—descent on death.

[5] 4 Co. Rep. 119b.

[6] Williams, Real Property (22nd ed.) 528; this rule did not apply to a waiver implied from the receipt of rent, if the breach was of a continuing kind; it only condoned breaches already committed, ibid; Pennant's Case (1596) 3 Co Rep. at f. 64b; cp. Smith, Leading Cases (10th ed.) 36-40.

[7] "The profession have always wondered at *Dumpor's Case*, but it has been law so many centuries, that we cannot now reverse it," *per* Mansfield, C.J., Doe d. Boscawen v. Bliss (1813) 4 Taunt. at p. 736; "though *Dumpor's Case* always struck me as extraordinary, it is the law of the land at this day," *per* Lord Eldon, Brummell v. Macpherson (1807) 14 Ves. at pp. 175-176.

down were followed. Indeed, in one respect, they were made more stringent; for, following the opinion of Staunford and Catlin, JJ., in 1558,[1] Lord Eldon held that a licence to assign which was not general, as in *Dumpor's Case*, but limited to a particular person, destroyed the whole condition.[2] As many later cases have pointed out, it is difficult to understand the principle upon which *Dumpor's Case* is based. It seems to me that it is based on several different principles, which, being logically applied, combined to produce rules which were not only absurd in themselves, but also led to very inconvenient results in practice. The following principles were, I think, the operative causes of this decision: In the first place, the case turned upon a covenant not to assign; and the result of the decision reached in it was to increase the freedom of assignment. This was in accordance with the policy of the common law because it secured freedom of alienation. The covenant against assignment was considered to be attached to the lessee's estate in the land. It was therefore held that the assignee, as a result of the licence, got an estate free from the covenant, which he could therefore assign or not as he pleased;[3] and it was the easier to hold this because the licence in *Dumpor's Case* was general. It was not, as we have seen, till later, that it was held that the same principle applied to a licence to assign to a particular person.[4] That the same rule was applied to this case is, I think, due to some of the other principles upon which the decision was based. In the second place, the decision rested upon the idea that a condition is an "entire" thing, and that any dispensation destroys it.[5] From this point of view it resembles the reason given for holding that rent and other periodical payments were not apportionable.[6] The obligation or condition was one entire thing, therefore a dispensation with, or a waiver of a condition in part, destroyed it wholly. In the third place, this view coincided with the principle of the common law that, "he who enters for a condition broken ought to be in of the same estate which he had at the time of the condition created."[7] Obviously, a lessor who had licensed the alienation of part of the land, could not, if he entered for the breach of the condition not

[1] Dyer 152a—contrary to the opinion of Brooke, Browne, and Dyer; but Coke clearly agreed with Staunford and Catlin, 4 Co. Rep. at f. 120b.

[2] Brummell v. Macpherson (1807) 14 Ves. 173.

[3] "In as much as by force of the lessor's licence, and of the lessee's assignment, the estate and interest of Tubbe (the assignee) was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition," 4 Co. Rep. at f. 120a.

[4] Above n. 2.

[5] "The condition being entire, could not be apportioned by the act of the parties, but by severance of part of the reversion it is destroyed in all," 4 Co. Rep. at f. 120b.

[6] Above 269.

[7] 4 Co. Rep. at f. 120b.

to assign the rest, get on his re-entry the same estate as he had had when the condition was made.

It seems to me that it was these divergent principles which united to produce the thoroughly irrational rule laid down in *Dumpor's Case*. Naturally its application to difficult states of fact gave rise to a large body of complicated rules, which troubled the law, till the whole principle was swept away, as to licences in 1859,[1] and as to actual waivers in 1860.[2]

(3) *Duties at the termination of the lease.*

The lessee must give up the property at the termination of the lease; and, if he does not, the lessor can re-enter peaceably[3] or bring ejectment. The property includes all articles which were originally fixed to the property, or which have become fixed to it during the term. This rests on the principle that anything annexed to the soil becomes the property of the owner of the freehold—*quicquid plantatur solo, solo cedit.* Of this maxim I shall speak later.[4] Here we are only concerned with it so far as it applies to determine what are fixtures which the tenant cannot remove on the termination of his lease.

This question of fixtures arises, as Lord Ellenborough, C.J., pointed out in *Elwes v. Maw*[5] in three classes of cases—firstly as between the heir and the executors of the owner of an estate of inheritance, secondly as between the executors of a tenant for life or in tail and the remainderman or reversioner, and thirdly as between landlord and tenant. In all these cases differences in modes of building construction, and in social and economic usages, have caused differences in the rules laid down from time to time in the long series of cases upon this subject.[6] These differences, coupled with the different considerations applicable to the three classes of cases in which these fixture questions arise, have made this branch of the law very uncertain in its application.

We are here concerned only with the third of these cases—those arising as between landlord and tenant; and in these cases the uncertainty of the law has been increased by a desire to relax the

[1] 22, 23 Victoria c. 35 § 1. [2] 23, 24 Victoria c. 38 § 6.
[3] Vol. iii 280. [4] Below 485. [5] (1802) 3 East at p. 51.
[6] "Mr. Levett has spoken of the courts changing the law. I do not think the law has changed. The change I should say is rather in our habits and mode of life. The question is still, as it always was, has the thing in controversy become parcel of the freehold? To determine that question you must have regard to all the circumstances of the particular case—to the taste and fashion of the day, as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important—and its relative importance is probably not what it was in ruder or simpler times," *per* Lord MacNaghten, Leigh v. Taylor [1902] A.C. at p. 162.

strict principles of the common law in favour of the tenant, and by the different views held by the judges as to the limits within which such relaxation should be allowed. The general principle was stated by Coke in *Herlakenden's Case* in 1589,[1] and in *Liford's Case*[2] in 1615. In the former case it was pointed out that such things as glass windows and wainscot went with the house, and in the latter that things which were part of the premises demised, such as the millstones in a mill, went with the mill, even though they were temporarily severed for purposes of repair.[3] But, as early as the reign of Henry VII., there are signs that the courts realized that too rigid an adherence to this principle might be bad for trade. If a tenant, who had set up fixtures for the purpose of his trade, was deprived of them at the end of his lease, it could hardly be expected that he would set them up. This point of view was perhaps hinted at in 1369;[4] and in 1505[5] it was said by some that if a lessee set up furnaces, vats, or vessels for his trade, he could remove them during the term, but that, if he left them on the premises at the expiry of the term, they would then belong to the lessor. This view of the law was upheld in 1704 in *Poole's Case.*[6] In that case, Holt, C.J., held that a soap boiler "might well remove the vats he set up in relation to trade, and that he might do it by the common law (and not by virtue of any special custom) in favour of trade and to encourage industry: but after the term they become a gift in law to him in reversion,[7] and are not removable." But he held that this exception operated only in the case of trade fixtures—"there was a difference between what the soap boiler did to carry on his trade, and what he did to complete the house, as hearths and chimney-pieces which were not removable."

Poole's Case became the starting point of the modern rule which gives to a tenant the right to remove "trade fixtures," and things accessory to them, provided, as later cases have decided,

[1] 4 Co. Rep. at ff. 63b, 64a. [2] 11 Co. Rep. at f. 50b.

[3] "And it is resolved in 14 Hen. VIII. 25b in *Wistow's Case* of Gray's Inn, that if a man has a horse mill, and the miller takes the mill stone out of the mill to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill, as if it had always been lying upon the other stone," ibid; cp. Moody v. Steggles (1879) 12 C.D. at p. 267 *per* Fry, I.

[4] Y.B. 42 Ed. III. Hil. pl. 191, where it was maintained that a furnace put up by a tenant for years was removable.

[5] "Et si le lessee per ans fait ascun tiel forneis pur son avantage, ou *dier* fait ses *fats*, et vaissells pur occupier son occupation durant le terme, il peut remuer eux: mes s'il souffrera eux etre fixes al terre apres le fin del terme donques ils appent al lessor; et sic d'un *baker*. Et n'est ascun waste de remuer tels choses deins le terme, *per Ascuns:* et ceo serra encontre les opinions avandits; car donque ne sera adjuge parcel de frank-tenement. Mes en H. 42 E. 3 il demeure pur ce doubte, lequel ce est waste on non," Y.B. 20 Hy. VII. Mich. pl. 24.

[6] 1 Salk. 368.

[7] Hence on the surrender of a lease the tenant loses any right which he might otherwise have had to remove the fixtures, Leschallas v. Woolf [1908] 1 Ch. 641.

that their removal does not involve serious damage to, or the destruction of, the premises demised.[1] But in respect to other fixtures, *Poole's Case* followed the strict rule of the earlier cases. In this respect the more recent cases have adopted a more liberal attitude. If the chattel is so fixed to the land or building that it can be removed without causing appreciable damage,[2] the test, as to whether it is or is not a fixture, has come to depend on the question whether it is fixed to land or buildings for more convenient use as a chattel, or whether it is fixed to the land or building for the more convenient use of the land or building. If it is affixed for the purpose of more convenient use as a chattel, it is not a fixture and is removable by the tenant. If it is affixed for the more convenient use of the land as land or the building as a building, it is a fixture and cannot be removed.[3] This is the test now adopted to determine whether or not any given chattel annexed to land or buildings is, or is not, a fixture. But it is subject to the exception in favour of trade fixtures established in *Poole's Case*[4] and many later cases; and, therefore, even though a chattel may be a fixture, and though for some purposes it may be treated as a fixture, yet, as between landlord and tenant, it may be removable by the tenant.[5]

In respect of one most important industry—the agricultural industry—this exception was not applied. That it was not applied is mainly due to the unfortunate decision of Lord Ellenborough in *Elwes v. Maw*.[6] In that case he explained away certain earlier decisions and dicta, in which the opinion had been expressed that the agricultural industry should be regarded as a trade, and that agricultural tenants should be allowed to remove chattels fixed to the land for the purpose of their trade.[7] He refused to regard agriculture as a trade, followed the general law, and ruled that, as the buildings in that case had been fixed to the land for its more convenient use as land, they could not be removed. This decision put agricultural tenants in a less advantageous position than tenants who carried on any other trade; and, in consequence, it has been necessary for the Legislature to intervene, and to give them that right to remove trade fixtures, which had long ago been allowed by the courts to other traders.[8]

[1] Lawton v. Lawton (1743) 3 Atk. at p. 14; 2 Smith, Leading Cases (10th ed.) 204.

[2] Wake v. Hall (1883) 8 A.C. at pp. 204-205 *per* Lord Blackburn.

[3] Ibid; cp. Holland v. Hodgson (1872) L.R. 7 C.P. at pp. 334-335 *per* Blackburn, J.; Hobson v. Gorringe [1897] 1 Ch. at pp. 189-191.

[4] 1 Salk. 368.

[5] Bain v. Brand (1876) 1 A.C. at p. 772 *per* Lord Chelmsford; Hobson v. Gorringe [1897] 1 Ch. at p. 192.

[6] (1802) 3 East 38.

[7] At pp. 55-57; cp. 2 Smith, Leading Cases (10th ed.) 205-206.

[8] 14, 15 Victoria c. 25 § 3; 46, 47 Victoria c. 61 § 34; 8 Edward VII. c. 28 § 21.

Covenants Running with the Land and with the Reversion

With respect to the benefit of covenants relating to the land, the law in the case of landlord and tenant started from somewhat the same general principles as in the case of similar covenants between the vendor and purchaser of an estate in fee simple.[1] We have seen that on a lease for life, when rent was reserved, the warranty implied from the use of the word "dedi," enabled the assignee of the lessee to sue;[2] and there can be little doubt that express or implied covenants relating to the land, entered into between landlord and tenant, could be enforced by the assignee of the tenant.[3] There seems no reason why such an assignee should not sue in covenant, just as the assignee in *Pakenham's Case* sued;[4] and it is clear that Coke considered that the principles there laid down were applicable as between landlord and tenant.[5] But with respect to the burden of covenants relating to the land, the law as to covenants as between landlord and tenant departed from the law as to covenants between vendor and purchaser of an estate in fee simple.[6] In the case of rent the law seems to have allowed that a lessor could bring debt against an assignee of the lessee.[7] Whether or not the burden of other covenants would run with the land, and whether or not the assignee of the land could be sued by writ of covenant, seem to have been matters upon which there is little or no mediæval authority.

The question whether or not the benefit or burden of a covenant could run with the reversion, was one upon which the rules relating to covenants on the sale and purchase of an estate in fee simple could shed no light; for on such a sale there was no reversion.[8] It would seem, however, that the benefit of the obligation to pay rent,[9] and the benefit of implied conditions, the breach of which gave the lessor the right to enter, were regarded as attached to the land itself, and not merely to the estate in land; so that, not only the assignee of the lessor, but also the lord who took by escheat, could enforce them[10]—these obligations were in

[1] Vol. iii 161-163.

[2] Co. Litt. 384b; above 256 n. 2.

[3] As to the covenant implied by the words "concessi" and "dedi" on a lease for years, see above 255; see also Spencer's Case (1583) 5 Co. Rep. at f. 17a.

[4] Vol. iii 162.

[5] In Spencer's Case (1583) 5 Co. Rep. at f. 17b, as a preface to his citation of Pakenham's Case, he says, "Observe reader your old books for they are the fountains out of which these resolutions issue."

[6] Vol. iii 163-165.

[7] Walker's Case (1587) 3 Co. Rep. at f. 22b.

[8] Vol. iii 165.

[9] Y.B. 5 Hy. VII. Pasch. pl. 12; Walker's Case (1587) 3 Co. Rep. at f. 22b.

[10] "Another diversity is between conditions in deed . . . and conditions in law. As if a man makes a lease for life, there is a condition in law annexed unto it; that if the lessee doth make a greater estate etc. that then the lessor may enter. Of this and the like conditions in law which do give an entry to the lessor, the lessor himself and his heirs shall not only take the benefit of it, but also his assignee, and the lord

fact very completely assimilated to easements. On the other hand, the burden of a warranty implied by law, and, according to a case of 1346,[1] the burden of an express warranty, would, if rent were reserved, bind the assignee of the lessor.[2] Whether a covenant for title in a lease for years, implied by the word demise or equivalent words, would have the same effect must be regarded as a doubtful question; and whether the benefit or burden of any other covenants would run with the reversion is equally doubtful. The preamble to the statute of 1540[3] would seem to negative the idea that the benefit or burden of any covenant would run with the reversion, so as to entitle the assignee to sue by writ of covenant.[4] But it is clear that some of the statements in the preamble are too wide, as they would negative the possibility of any covenant running, not only with the reversion, but also with the land; and, as we have seen from the preamble to the statute of Uses,[5] we cannot place very much reliance on the preambles to the Tudor statutes. Authority is scanty and conflicting;[6] and there are two good reasons why this is so. In the first place, it would seem from Coke's report of *Spencer's Case* that there was very little mediæval authority on this matter—if he had known of more it is quite clear that he would have cited more. In the second place, the new rules introduced by the statute of 1540, and the decision in *Spencer's Case*, really made a new starting point in this branch of the law, behind which it was rarely necessary to go.

The occasion for the passing of the statute of 1540 was the large transfer of reversionary interests, which followed on the dissolution of the monasteries, and on the gift of these reversions

by escheat, every one for the condition in law broken in their own time," Co. Litt. 215a; cp. Wedd v. Porter [1916] 2 K.B. at p. 101 *per* Swinfen-Eady, L.J.

[1] Y.B. 20 Ed. III. (R.S.) i 372-374.

[2] Co. Litt. 384b, cited above 256 n. 2.

[3] 32 Henry VIII. c. 34.

[4] "For as much as by the common law of this realm no stranger to any covenant action or condition shall take any advantage or benefit of the same by any means or ways in the law, but only such as be parties or privies thereunto"; and then it assigns this as the reason why the grantees of the monastic lands "be excluded to have any entry or action against the said lessees and grantees their executors or assigns which the lessors before that time might, by the law, have had against the same lessees for the breach of any condition covenant or agreement comprised in the indentures of their said leases."

[5] Vol. iv 460.

[6] In Barker v. Damer (1691) 3 Mod. at p. 338, and Thursby v. Plant (1669) 1 Wms. Saunders at p. 238, it is said that an assignee of the reversion could not bring covenant at common law; in Attoe v. Hemmings (1613) 2 Bulstr. 281 Coke, C.J., said that the grantee of a reversion had an action of covenant at common law; in Harper v. Burgh (1677) 2 Lev. at p. 207, it was said that covenants in law to pay rent, implied from the reddendum, ran with the reversion at common law; and the same view was taken by Bayley, J., in Vyvyan v. Arthur (1823) 1 B and C. at p. 414; serjeant Williams, 1 Wms. Saunders 300 n. 10, took the view that the assignee of the reversion could not bring covenant at common law; on the other hand, Platt, Covenants 531-532, thought that though at common law the grantee of a reversion could not sue on express covenants, he could sue on an implied covenant.

by the king to various favoured persons.[1] It enacted that the grantees of the reversions of lands formerly belonging to the religious houses, and all other grantees of other reversions, should have the same rights against the lessees and their assigns by entry or action for non-payment of rent, or waste, or non-performance of other conditions or covenants, as the original lessors had; and, conversely, that lessees and their assigns should have "like action advantage and remedy" against the assignees of the reversion and their assigns, as they had against their original lessors—except only that they could not take advantage of "any warranty in deed or in law by voucher or otherwise."

This statute applied only to reversions on leases for life or years, and not to gifts in fee or in tail.[2] It is clear that it made a wholly new departure in this part of the law of landlord and tenant. In the first place, it gave to assignees of the reversion a right to enforce, and put these assignees under a duty to fulfil, covenants in leases. In the second place, it gave to assignees of the land the right to enforce, and put them under a duty to fulfil these covenants. The existing duties as to warranties, express or implied, were excepted from the Act; and this is perhaps an additional proof that these duties were becoming obsolete, and were giving place to the duties based on express covenants contained in leases.[3] But the provisions of the Act were very wide. It contained no sort of definition as to the kind of covenants which were to run with the land or the reversion. This and other matters were left for the courts to elucidate, in the light of the scanty authority which they possessed. As we shall now see, in the light of the guidance given by the Act and of the existing principles of the law, and in the light of the new situation created by the Act, they performed their task of interpretation with considerable skill.

(i) The first need was to ascertain the kind of covenants to which the statute applied. This was finally met by the decision in *Spencer's Case* in 1583,[4] which was based partly on the older rules applicable to the case of vendor and purchaser of an estate in fee simple,[5] and partly on the obvious needs of landlords and tenants. If the covenant touched or concerned the estate in the land demised or something actually on it, not only the benefit, but also the burden of it, ran with that estate. Probably the rule that the burden ran with the estate in the land as well as

[1] 32 Henry VIII. c. 34 Preamble; the king's interests had already been provided for by 31 Henry VIII. c. 13 §§ 1 and 2; the first cited Act was passed to safeguard the rights of the king's grantees, and opportunity was taken to make the Act apply generally to all cases where reversions were assigned, see Co. Litt. 215a.

[2] Lewes v. Ridge (1601) Cro. Eliza. 863; Co. Litt. 215a.

[3] Above 257-258. [4] 5 Co. Rep. 16a. [5] Vol. iii 161-165.

the benefit, was due to considerations of convenience, and was perhaps new law.[1] Such lessees could not create permanent charges on the land in the same manner as owners in fee simple. Moreover, there were not the same dangers that by such covenants the land would be rendered inalienable. If, however, the covenant related to something to be newly done on the land demised there was nothing in being to which the covenant could be annexed.[2] After some hesitation,[3] the law reverted to the old analogy of succession, which Bracton had made use of in connection with the old clauses of warranty,[4] and laid it down that the benefit and burden of such covenants would only run with the estate in the land if assigns were named; and, though this rule has been criticized,[5] it is still law. It is obvious that neither principle touches covenants merely collateral, i.e. those which have no reference to the land demised. Such covenants therefore can never run with the land.[6] The same principles as were applied to covenants running with the land were applied to covenants running with the reversion, by the resolution that the statute of 1540 extended "to covenants which touch or concern the thing demised and not to collateral covenants."[7] They were also applied to the remedies for breach of conditions, by the ruling that the assignees "shall not take the benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as rent, or for the benefit of the state.[8] A long line of cases has decided what sort of covenants do, and what do not, come within the various categories of covenants defined in *Spencer's Case*.[9]

(ii) Secondly, in accordance with the principle generally applied by the common law,[10] these covenants ran, not with the land or the reversion, but with the estate in the land, and with the reversion to which they were originally annexed. An assignee of

[1] "If the law should not be such, great prejudice might accrue to him; and reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee, should, on the other side, be bound by the like covenant when the lessee makes it with the lessor"; it was therefore said that "the covenant is appurtenant and goeth with the land," at f. 17b.

[2] "It cannot be appurtenant or annexed to a thing which hath no being," at f. 16a.

[3] The contrary conclusion was come to by the Common Pleas in 1584, Anon. Moore 159; see as to this case 1 Smith, Leading Cases (10th ed.) 67-68; what amounts to a thing to be newly done was not very clearly defined; see Cookham v. Cock (1607) Cro. Jac. 125, where it was held that a covenant not to plough 15 acres of the land demised each year, ran with the land, though assigns were not named.

[4] Vol. iii 161-162.

[5] 1 Smith, Leading Cases (10th ed.) 66-69.

[6] Spencer's Case, 5 Co. Rep. at f. 16b.

[7] Ibid, at f. 18a.

[8] Co. Litt. 215b; by state is clearly meant estate; the instances given are conditions for not doing waste, repairing houses, making fences, scouring ditches, preserving woods.

[9] 1 Smith, Leading Cases (10th ed.) 65-66.

[10] Vol. iii 158.

part of the land,[1] or of a particular estate in the whole reversion, e.g. a grantee of the reversion for life or years,[2] gets an estate with which the covenants and conditions will run, by virtue of the Act of 1540 or in accordance with the rules in *Spencer's Case;* and the assignee of the reversion of part of the land, can take the benefit of the covenants, but not formerly of the conditions,[3] because, as we have seen,[4] conditions could not be apportioned at common law.[5] On the other hand, an under-lessee is not an assignee of the land since he takes a new and a different estate, so that, except by virtue of express stipulation, he is neither bound by, nor can he enforce the covenants in his lessor's lease.[6] Conversely, if the reversion on a lease was destroyed, e.g. by merger, there was nothing with which the covenants could run, so that the lessee could rely only on the personal liability of the original lessor.[7] The law as to under-lessees is still the same; but the consequences of the rule that the covenants could only run with the reversion to which the covenants were originally annexed, were found to be so inconvenient, that the rule was first modified, and finally swept away.[8]

(iii) Thirdly, though these covenants were annexed to the land, the original lessee did not cease to be personally liable. Though it was at first doubted, it was finally held in *Walker's Case* in 1587, that an action of debt for rent would lie against the original lessee after assignment,[9] and before the lessor had accepted the assignee of the lessee as his tenant, but not after such acceptance.[10] Early in the seventeenth century it was held that an action of covenant would lie against the original lessee after assignment, for rent, and for breach of the express covenants in his lease;[11] and, conversely, by virtue of the statute of 1540, the

[1] 1 Smith, Leading Cases (10th ed.) 60. [2] Co. Litt. 215a.
[3] Ibid. [4] Above 282-283. [5] See above 284 for later statutory charges.
[6] Co. Litt. 385a, cited vol. iii 158; the principle there stated seems to have been applied from the first without question to the case of the under-lessee, see South of England Dairies v. Baker [1906] 2 Ch. at p. 638 *per* Joyce, J.
[7] Thre'r v. Barton (1570) Moore 94; nor would the covenants run with the estate of those who "came in merely by act in law," as e.g. the lord by escheat, Co. Litt. 215b.
[8] 4 George II. c. 28 § 6; 8, 9 Victoria c. 106 § 9; 44, 45 Victoria c. 41 §§ 10, 11.
[9] "It was said that it was held by Sir Robert Catlin, late chief justice, that the lessee shall not be charged for rent due after the assignment. But on great deliberation and conference with others, it was adjudged by Wray, L.C.J., Sir Thomas Gawdy, and the whole court of King's Bench that the action would lie after such assignment," Walker's Case (1587) 3 Co. Rep. at f. 22b; the case was denied to be law in Marrow v. Turpin (1599) Cro. Eliza. 715; and the rule is qualified by the condition laid down in Thursby v. Plant, next note.
[10] Thursby v. Plant (1669) 1 Wms. Saunders at p. 240.
[11] Barnard v. Goodschall (1613) Cro. Jac. 309; Bachelour v. Gage (1631) Cro. Car. 188; but not it would seem on implied covenants, Batchelour v. Gage, W. Jones 223; Brett v. Cumberland (1619) Cro. Jac. at p. 523; Anon. (1670) 1 Sid. 447; but cp. 1 Smith, Leading Cases (10th ed.) 70.

assignee of the lessor is entitled to bring these actions against the original lessee.[1] On the other hand, the liability of an assignee of the land is not a personal liability. It begins and ends with his tenure of the land.[2]

There are many cases in which the legislation of the Tudor period, and the interpretation of that legislation by the judges, have built up modern law on the foundation, partly of the new needs of the sixteenth century, and partly of the rules of the mediæval common law. No better illustration of the successful employment of these processes can be found than this branch of the law of landlord and tenant.

The Termination of the Tenancy

A tenancy terminates upon the lapse of the period for which it was created. If created by deed, it will begin from the date of the delivery of the deed; so that, if, for instance, it is to last for a period of three years, it will continue till the end of the day preceding the anniversary of the day on which it was delivered.[3] Already in Coke's day the law had acquired a number of rules as to the meaning to be attached to various periods of time—years, quarters, and months.[4] Also the length and other requisites of a notice to quit, which is required in the case of a tenancy from year to year, gradually became the subject of a number of rules, into the details of which it is not necessary to enter.[5]

The termination of the tenancy by effluxion of time, and by notice, are the regular methods. In addition, the law has, from an early date, recognized certain other methods which can be grouped under the two heads of forfeiture, and surrender and merger.

Forfeiture.—In the sixteenth century it was frequently provided in leases that, on the non-payment of rent or on the non-performance of some other condition, the lease should be void or voidable. At that time a good deal turned, firstly on the use of the words "void" or "voidable," and secondly on the question whether the lease was for years or for life. If the lease was for years, the word "void" was construed in its literal sense.[6] On the non-performance of the condition the lease ceased to exist.

[1] Brett v. Cumberland (1617) Cro. Jac. 399, and at p. 523; whether in such a case the lessor can sue *quare*, Beeley v. Parry (1684) 3 Lev. 154; 1 Smith, Leading Cases (10th ed.) 70.

[2] Pitcher v. Tovey (1693) 1 Salk. 81; cp. Middlemore v. Goodall (1639) Cro. Car. 503.

[3] Clayton's Case (1586) 5 Co. Rep. 1a.

[4] Co. Litt. 135a, 135b.

[5] For these details see Halsbury, Laws of England xviii 443 seqq.

[6] Browning v. Beston (1553) Plowden at p. 135; Pennant's Case (1596) 3 Co. Rep. at ff. 64b, 65a.

From this fact it followed, firstly, that no future acceptance of the rent could affirm the lease;[1] and, secondly, that a grantee of the reversion could take the benefit of this condition, and treat the lease as non-existent.[2] If, on the other hand, the lease was for life, it was necessary to construe the word "void" as "voidable," because the estate, being an estate of freehold created by livery, could not be determined before entry.[3] It followed that, as the lease still subsisted till entry, the breach of the condition did not make it void, but only gave the lessor the option to avoid it by making an entry.[4] Hence acceptance of rent before entry barred the lessor of his right of entry;[5] and, as a right of entry for breach of condition could not, till the statute of 1540,[6] be reserved to a stranger, the assignee of the reversion could not take advantage of it.[7] But this distinction has now ceased to be of practical importance. On the principle that the lessee ought not to be allowed to take advantage of his own wrong, which a literal construction of the word "void" would enable him to do, the courts have, in the nineteenth century, in all cases construed the word "void" as meaning "voidable"; so that the lessor has the option either to terminate the lease or to waive the forfeiture.[8]

In a certain limited class of cases equity would give relief against a forfeiture incurred by a lessee for the breach of a condition.[9] The power to give this relief has been greatly enlarged and accurately defined by the provisions of the Conveyancing Acts 1881[10] and 1892.[11]

Surrender and merger.—A surrender by a tenant for life or years to the immediate reversioner destroyed the estate of the tenant by merger;[12] and, after some difference of opinion, it was ultimately settled, at the end of the sixteenth century, that this result would take place even though the reversioner was a tenant for a term of years, and even though his term was shorter than that of the term surrendered.[13] Around this leading principle a

[1] 3 Co. Rep. at f. 64b; Co. Litt. 215a.
[2] 3 Co. Rep. at f. 65a; Co. Litt. 214b.
[3] Browning v. Beston (1553) Plowden at pp. 135-136; Pennant's Case (1596) 3 Co. Rep. at f. 65a.
[4] Co. Litt. 214b.
[5] 3 Co. Rep. at f. 64b.
[6] 32 Henry VIII. c. 34; above 289.
[7] Litt. § 347; Co. Litt. 215a; 3 Co. Rep. at f. 65a.
[8] 1 Smith, Leading Cases (10th ed.) 40, 41; Davenport v. the Queen (1877) 3 A.C. at p. 128.
[9] See Ashburner, Equity 359; the earlier cases went too far in giving relief; but Lord Eldon in Hill v. Barclay (1811) 18 Ves. 56 practically limited its interference to the breach of a covenant for payment of rent.
[10] 44, 45 Victoria c. 41 § 14.
[11] 55, 56 Victoria c. 13 § 2.
[12] Co. Litt. 337b, cited vol. iii 232.
[13] In Parry v. Allen (1590) Cro. Eliza. 173 it was held that "one term cannot drown in another"; but in Hughes v. Robotham (1593) Cro. Eliza. 302 the court held that "if the testator had the reversion for a less number of years, yet the surrender is good, and the estate shall drown in it."

considerable body of law grew up during this period, firstly as to the ways in which a surrender could be effected; secondly as to the distinction between an express surrender and a surrender by operation of law; and thirdly as to the operation of a merger brought about by means of a surrender.

(i) Until the passing of the statute of Frauds,[1] an estate for life or years could be surrendered, as it could be created, by parol. "Estate for life of lands may be surrendered without deed and without livery of seisin, because it is but a yielding or a restoring of the estate again to him in the immediate reversion or remainder, which is always favoured in law."[2] The statute of Frauds[3] required writing, and the Act of 1845[4] a deed. But for the surrender of incorporeal things, which lay in grant, a deed was always required. They could not be created without a deed, and "by consequent the estate cannot be surrendered without a deed."[5] In either case the surrender divested the property from the surrenderor, and vested it in the surrenderee immediately, whether or not the surrenderee had notice of the surrender. In this respect its operation was analogous to that of a deed of gift; for in both cases the consent of the party benefited was presumed.[6]

(ii) From the sixteenth century onwards, the law has recognized that "A surrender is of two sorts, viz. a surrender in deed . . . and a surrender in law wrought by a consequent by operation of law."[7] A surrender in law occurred when a lessee, during the term of his lease, took a fresh lease from his lessor, to begin during the term of the old lease. The acceptance of the new lease operated as a surrender of the old, even though the new lease was a future lease, and even though it was for a shorter period than the original lease; for, as Coke pointed out, "the lessee by acceptance thereof affirmed the lessor to have ability to make the new lease, which he had not, if the first lease shall stand."[8] In

[1] 29 Charles II. c. 3 § 3.
[2] Co. Litt. 338a; Sleigh v. Bateman (1597) Cro. Eliza. 487.
[3] 29 Charles II. c. 3 § 3. [4] 8, 9 Victoria c. 106 § 3. [5] Co. Litt. 338a.
[6] Thompson v. Leach (1698) 2 Salk. 618; this really followed from the rule that, "if tenant for life by the agreement of him in the reversion surrender unto him; he in the reversion hath a freehold in law in him before he enter," Co. Litt. 266b.
[7] Ibid 338a.
[8] Ive's Case (1598) 5 Co. Rep. at 11b; "as if lessee for twenty years takes a lease for three years, to begin ten years after; it is a present surrender of the whole term, for it cannot be a surrender of the last ten years, and remain for the first ten years, and so to make a fraction of the term, nor can he who had a lease for twenty years, surrender the last ten years by any express surrender, saving to him the first ten years," ibid; see also Fulmerston v. Steward (1554) Plowden 107 *per* Bromley, C.J.; Hughes v. Robotham (1593) Cro. Eliza. at p. 302 *per* Popham, C.J.; for the later history of the doctrine see 2 Smith, Leading Cases (10th ed.) 813-823. Note that mere assent will not do without actual acceptance of the new lease, see the authorities cited by Parke, B., in Lyon v. Reed (1844) 13 M. and W. at p. 307; Wallis v. Hands [1893] 2 Ch. at pp. 81-82 *per* Chitty, J.

one case a surrender by operation of law was possible when a surrender in deed was not possible. "As if a man make a lease for years to begin at Michaelmas next, this future interest cannot be surrendered, because there is no reversion wherein it may drown, but by a surrender in law it may be drowned. As if the lessee before Michaelmas take a new lease for years, either to begin presently, or at Michaelmas, this is a surrender in law of the former lease."[1] It should be noticed, however, that it was recognized in the sixteenth century that a surrender by operation of law could not prejudice strangers, such as under-lessees, who were not parties to the transaction;[2] though such strangers could, if it were to their benefit, take advantage of a surrender of the estate.[3] Thus, in the case of *Wrotesley v. Adams*,[4] a lease for years had been surrendered and merged in a new lease for life. It was held that a stranger, who had a lease for years limited to begin on the expiry of the surrendered lease for years, could take advantage of the determination of the lease for years brought about by the surrender, and enter on the land.[5]

(iii) The rule that a merger, brought about through a surrender by the operation of law, ought not to work to the disadvantage of third persons, showed that the common law recognized that the doctrine of merger might, if carried to its logical conclusion, work grave injustice. The recognition of this fact is shown also by the rule that if a lessor, who had the fee simple, acquired a term in the same lands *en auter droit* (e.g. if he married the lessee for years) there would be no merger.[6] The same principle was also (contrary to the opinion of Coke)[7] applied to the converse case, where a husband had the term in his own right, and the inheritance in right of his wife;[8] and to the case where a person held property as executor or administrator.[9] But, subject to these exceptions, the doctrine of merger operated irrespective of the intention of the parties.[10] We have seen that in one case—the

[1] Co. Litt. 338a.

[2] "Having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice, touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance," ibid 338b.

[3] "For the benefit of an estranger the estate for life is absolutely determined," ibid.

[4] (1558) Plowden 189.

[5] "The first estate for years being abbreviated by the taking of the lease for life trenches to the advantage of the plaintiff, and makes his term to commence upon that determination," ibid at pp. 198-199.

[6] Co. Litt. 338b—"A man may have a freehold in his own right and a term en auter droit."

[7] "A man cannot have a term for years in his own right and a freehold en auter droit to consist together," ibid.

[8] Platt v. Sleap (1612) Cro. Jac. 275.

[9] Co. Litt. 338b.

[10] "All the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity

case where the covenants running with the reversion were destroyed by the surrender of the reversion—the Legislature has interfered.[1] In other cases the rule evolved by equity in connection with family settlements,[2] then extended to other cases,[3] and now by the Judicature Act[4] binding on all courts, that the question whether merger shall take place or not is dependent on the intention of the parties, has provided a sufficient remedy.

In the sixteenth century the law of landlord and tenant was based mainly on the principles of the mediæval land law; and traces of these principles may still be discerned in it. But, even in the sixteenth century, landlords and tenants were very free to regulate the terms of their relationship by express covenants. Many of these express covenants became very usual covenants; and, through the joint efforts of the conveyancers who drew these covenants and of the courts who interpreted them, this branch of the law was gradually adapted to the needs of landlords and tenants of many different classes of property—of manufacturing and residential properties in urban and suburban districts, and of properties in agricultural and mining areas. With some assistance from equity and the Legislature, the modern law of landlord and tenant was gradually built up on these foundations; and it is this branch of the law which now, for the most part, regulates the rights and duties of those who dwell upon, or who make their living from, the land in country or in town. But this assertion could not have been made in the sixteenth century. Then, and for many years to come, the rural districts were largely peopled by tenants whose rights and duties were determined, not by a contract made between landlord and tenant, but by the customs which regulated the tenure of land in particular manors. To the history of this older order of tenants we must now turn.

§ 8. Copyholds

We have seen that in 1584 Coke could say that "great part of the land within the realm is in grant by copy."[5] Therefore,

of which he is estopped from disputing, and which could not have been done, if the particular estate continued to exist. The law then says that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently and even in spite of intention," Lyon v. Reed (1844) 13 M. and W. at p. 306 *per* Parke, B.

[1] Above 291.

[2] See Saunders v. Bournford (1679) Finch 424; Thomas v. Keymis (1701) 1 Eq. Cas. Ab. 269 pl. 10.

[3] "A court of equity had regard to the intention of the parties, to the duty of the parties, and to the contract of the parties, in determining whether a term was to be treated as merged in the freehold," Capital and Counties Bank v. Rhodes [1903] 1 Ch. at p. 653 *per* Cozens-Hardy, L.J.

[4] 36, 37 Victoria c. 66 § 25 (4).

[5] Heydon's Case 3 Co. Rep. at f. 8b, cited vol. iii 209 n. 7.

during this century, and in fact for several centuries afterwards, the law relating to copyholds was of very great practical importance. We have seen that it was during the sixteenth century that the common lawyers, both by their decisions and by their writings, were settling the jurisdiction and powers of the manorial courts and their officials,[1] which, under the supervision of the courts of law and equity, and of the courts of Starchamber and Requests, were administering and applying the custom of the manor; and we have seen that it was during this period that the joint efforts of these courts were beginning to create, on the basis of the different yet similar customs of many manors, the modern law of copyhold tenure.[2] The creation of this body of law was no easy task. It involved, firstly, a nice adjustment of the conflicting claims of custom and the common law; secondly, much consideration of the problem of the application of the statutes and the doctrines of the common law to copyholds; and, thirdly, the due recognition and protection of the conflicting interests of lords and tenants. This body of law was never wholly satisfactory; for it suffered from the defects both of obscurity and technicality. The custom of the manor was often uncertain;[3] the procedure of the manor court was often both antiquated and technical;[4] and the technicalities of the common law doctrines, which were applied to eke out the defects of the manorial custom, helped to make this branch of the law very complex. The changed political and economic conditions of the nineteenth century brought into clear relief the anomalous and inconvenient character of this tenure. It had, it is true, always been possible to convert it into socage tenure; but there were many difficulties in taking this course;[5] and, by reason of the diversity of its incidents, there were difficulties in the way of directly extinguishing it.[6] Consequently in the nineteenth century the Legislature has gradually come to the conclusion that the best way of dealing with it is to provide facilities for its conversion into socage tenure. Its efforts have succeeded. Copyhold tenure rapidly became a mere survival, and is now abolished.

I shall sketch briefly the main outlines of this history under the following heads: (1) Custom and the Common Law; (2) Lord and Tenant; and (3) The Extinguishment of Copyhold Tenure.

(1) *Custom and the Common Law.*

We have seen that the lawyers of the sixteenth century held that the manor must have existed time out of mind.[7] It was

[1] Vol. i 182; vol. iv 120-121, 128-131.
[2] Vol. iii 209-213.
[3] Below 309.
[4] Vol. i 186-187; vol. ii 371, 398-399.
[5] Below 310-311.
[6] Below 309.
[7] Vol. i 184.

because they held that the manor had existed from time immemorial that they regarded manorial custom as a true law. Just as it was time which was "the soul that gave life" to the manor,[1] so it was the custom of the manor which was the "soul and life of copyhold estates";[2] for it was this custom which had, at any rate from the thirteenth century onwards, prevented the copyholder's estate from being an estate held merely at the will of the lord,[3] and had therefore justified the common law in compelling the lord to observe it.[4] It followed that the incidents of copyhold estates were infinitely various. They were governed by customs which departed at many points from the general custom of the realm—the common law. "And so it is to be understood," says Littleton, "that in divers lordships, and in divers manors, there be many and divers customs in such cases, as to take tenements, and as to plead, and as to other things and customs to be done, and whatsoever is not against reason may well be admitted and allowed."[5] But, even in Littleton's day, the lawyers had begun to realize that some customs might be generally applicable to all copyhold estates. Thus Littleton could state as a general rule that such tenants could not alien their land by deed, but must convey by surrender and admittance;[6] that the only evidence of their title was the copy of the court roll;[7] that they could sue in their lord's court in forms which followed the real actions allowed to freeholders by the common law;[8] and that they all owed fealty to their lords.[9]

In the sixteenth century this tendency to uniformity had increased by reason of the strict supervision of the central courts, and more especially of the courts of common law. Thus in *Combe's Case*,[10] the Court laid it down that, "every copyholder having a customary estate of inheritance may, *de communi jure*, without any particular custom, surrender his lands held by copy in full court," from which the conclusions were deduced, firstly

[1] "The efficient cause of a manor is expressed in these words, *of long continuance;* for indeed time is the mother, or rather the nurse of manors; time is the soul that giveth life unto every manor, without which a manor decayeth and dieth," Coke, Copyholder § 31.

[2] Brown's Case (1581) 4 Co. Rep. at f. 21a.

[3] Vol. ii 379-381; "and the estate of a copyholder is not a mere estate at will, but *secundum consuetudinem manerii*, which custom hath fixed and strengthened his estate," Margaret Podger's Case (1613) 9 Co. Rep. at f. 105b.

[4] Vol. iii 208-209. [5] Litt. § 80. [6] § 74. [7] § 75.

[8] § 76—"If they will implead others for their tenements they shall have a plaint entered in the Lords Court in this form or to this effect: A of B complains against C of D of a plea of land, *viz.* of one messuage, forty acres of land, four acres of meadow etc. with the appurtenances, and makes protestation to follow this complaint in the nature of the king's writ of assize of mortdancestor at the common law, or of an assize of novel disseisin, or formedon in the descender at the common law, or in the nature of any other writ."

[9] § 84. [10] (1614) 9 Co. Rep. at f. 75b.

that in pleading he need not allege a custom to make such surrenders, and secondly that he could surrender by attorney. Coke can lay down some detailed rules as to the making of surrenders, presentments, and admittances;[1] and as to the differences between voluntary admittances, and admittances on surrenders or on descents.[2] It was also laid down as a general rule, in a tract written at the end of the seventeenth century,[3] that "a copyholder may take House-bote, Hedge-bote, and Plough-bote upon his copyhold lands of common right, as a thing incident to the grant, if it be not restrained by a custom."[4] Similarly, it was a very general and a very inconvenient custom in copyhold estates that, while the tenant was not entitled to the timber or the minerals, the lord was unable to enter and take them.[5] It is clear from the cases that this tendency to uniformity was due to the increasing strictness with which the common law enforced their canons of reasonableness on these manorial customs.

We have seen that, even in Littleton's day, the common law claimed to be able to refuse to admit the validity of a custom which was unreasonable.[6] Coke goes a great deal further, and lays down distinct canons of reasonableness with which customs must comply;[7] and, both in the sixteenth and in the succeeding centuries, very many customs were adjudicated on by the courts. Thus the reasonableness of a fine was a matter to be "determined by the opinion of the justices . . . for if the lords might assess unreasonable fines at their pleasures, then most estates by copy . . . might now at the will of the lords be defeated and destroyed."[8] Similarly, the imposition of a fine, on every change of lord by act of the party, was held to be unreasonable, "for by that means the copyholders may be oppressed by multitude of fines by the act of the lord. But when the change groweth by the act of God, then the custom is good, as by the death of the lord."[9] A custom that every copyhold tenant might cut down trees at his pleasure was held to be unreasonable, for "by that means the succeeding copyholder should not have any for his use to repair his house";[10] but such a custom might, it was thought, be

[1] Copyholder §§ 38-41. [2] Below 305.

[3] This supplement is printed at the end of an edition of Coke's Copyholder published in 1673.

[4] At p. 65.

[5] Williams, Real Property (22nd ed.) 475; Commission on the law of Real Property 1832, Third Rep. 15, cited below 309 n. 4.

[6] Above 298. [7] Copyholder § 33.

[8] Hobart v. Hammond (1600) 4 Co. Rep. at f. 27b.

[9] Co. Litt. 59b—"and this, upon a case in the Chancery referred to Sir John Popham, Chief Justice, and upon conference with Anderson, Periam, Walmesley, and all the judges, of Serjeant's Inn in Fleet Street was resolved and so certified into the Chancery."

[10] Powel v. Peacock (1605) Cro. Jac. 30.

reasonable if the copyholder had the inheritance.[1] A custom that the copyhold was forfeited, unless the heir claimed to be admitted at the next court after three proclamations of the death of his ancestor, was allowed to be good; but the majority of the court held that an exception must be made in favour of an heir who was beyond the seas.[2] A custom that, if the tenant had no beast at the time of his death, or if the best beast were eloigned before seizure, the lord could seize as a heriot the beast of a stranger "levant et couchant" on the land, was held to be void.[3]

These are only a few illustrations of the very many cases in which the common law courts pruned the luxuriance of manorial customs, and reduced them to its own standards of reasonableness. But the influence of the common law did not stop here. It was applied not only "corrigendi," but also "supplendi" and "adjuvandi causa." As illustrations let us look at some of the rules applied to regulate the devolution of a copyhold estate, the kinds of estates permitted, the application of statutes, and the doctrines of the common law.

The wife's rights to the property on the death of the husband, and the husband's rights on the death of the wife, were regulated by the custom of the manor. Very generally the wife had a right to free bench, which was often the right to half the estate of which her husband was seised, for her life, or while she continued unmarried and chaste; and the husband had rights to the whole or half of his wife's land, sometimes if there was issue of the marriage, sometimes whether or not there was issue.[4] A claim to dower[5] or curtesy[6] as at common law, must be justified by proving a custom that in that particular manor such dower or curtesy was allowed. Similarly the rules of inheritance might be varied by the custom. In some manors, for instance, the rule of gavelkind or borough English prevailed.[7] But these customs were construed strictly; and, except in so far as they prevail, the rule of the common law holds.[8] "The descents of copyhold of inheritance," says Coke, "are guided and directed by the rules of common law."[9] Thus the rules as to inheritance ex parte

[1] Rockey v. Huggens (1632) Cro. Car. at p. 221.
[2] Underhill v. Kelsey (1610) Cro. Jac. 226.
[3] Parton v. Mason (1561) Dyer 199b. The lord could either seize or distrain for a heriot, Plowden 96; from this rule the consequence was deduced that, on the death, the property in the heriot vests in the lord, and that therefore it can be seized out of the manor, ibid; Parker v. Gage (1688) 1 Shower 80; Western v. Bailey [1897] 1 Q.B. 86.
[4] Commission on the Law of Real Property, 1832, Third Rep. 14.
[5] Shaw v. Thompson (1597) 4 Co. Rep. 30b.
[6] Rivet's Case (1582) 4 Co. Rep. 22b; Paulter v. Cornhill (1595) Cro. Eliza. 361.
[7] Commission on the Law of Real Property, 1832, Third Rep. 14.
[8] Ratcliffe and Chaplin's Case (1611) 4 Leo. 242; Denn v. Spray (1786) 1 T.R. 466.
[9] Copyholder § 50; Brown's Case (1581) 4 Co. Rep. at f. 22a.

paterna and ex parte materna,[1] and the rule as to the half blood,[2] were applied.

The general rules as to the kinds of estates permitted in lands of copyhold tenure, and the words by which they were limited, followed the rules of the common law; "as well estates as descents shall be directed by the rules of the common law, as necessary consequents upon the custom, unless there is a special custom (which is always to be observed) within the manor; as these words *sibi et suis*, or *sibi et assignatis*, or such like, may by custom create an estate of inheritance."[3] It was with respect to the possibility of limiting an estate tail in lands of copyhold tenure that the greatest differences of opinion arose. But the merits of this controversy can hardly be appreciated till we have considered the tests which the common law courts applied to determine the question whether or not any given statute should be applied to copyholds.

A general rule in this matter was laid down in *Heydon's Case* in 1584;[4] "When an Act of Parliament doth alter the service, tenure, or interest of the land, or other thing, in prejudice of the lord, or of the custom of the manor, or in prejudice of the tenant, there the general words of such Act of Parliament shall not extend to copyholds: but when an Act of Parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, then many times copyhold and customary estates are within the general purview of such Acts." This general principle sufficed to settle most cases. Thus it was held that the statute of Westminster II., which gave the writ of elegit, could not extend to copyholds, because it would be both prejudicial to the lord and a breach of the custom, that any stranger should have an interest in the land, without admittance by the lord.[5] Similarly the statute of Uses could not be applied to copyholds, "because the transmutation of possession by the sole operation of the statute, without allowance by the lord or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant."[6] But in some cases the application of the principle was not quite so obvious. Thus it was at first held that the statute of 1540, which allowed covenants as between landlord and tenant to run with the reversion,[7] did not apply to a copyhold reversion.[8] But this decision was over-ruled in 1692

[1] Copyholder § 50; for this rule see vol. iii 179-180.
[2] Brown's Case (1581) 4 Co. Rep. at f. 22b; for this rule see vol. iii 183-185.
[3] Bunting v. Lepingwell (1586) 4 Co. Rep. at f. 29b; Coke, Copyholder §§ 49, 50.
[4] 3 Co. Rep. at f. 8a.
[5] Coke, Copyholder § 53.
[6] Ibid § 54.
[7] Above 288-289.
[8] Beal v. Brasier (1613) Cro. Jac. 305.

—it was, it was truly said, a remedial law, and no prejudice could arise to the lord.[1] It therefore came within the principle, and of some of the illustrations of that principle, contained in *Heydon's Case*.[2]

It is upon the application of the statute De Donis Conditionalibus to copyholds that the greatest differences of opinion have arisen. When Coke wrote his treatise upon copyholds it was a "vexata quæstio";[3] and both parties to the controversy could adduce powerful arguments in their favour. Manwood, C.B., gave several good reasons[4] why the statute De Donis should not apply to copyholds. Firstly, the statute altered both the estate and the tenure of the land. It created a new estate, which differed at many points from the old fee simple conditional at common law; and it created a new tenure between the donor and the donee in tail. Secondly, as neither fines nor recoveries were applicable to copyholds, it was difficult to see how such estates could be barred; and if they could not be barred, it was quite clear that perpetuities[5] could be easily created in copyhold estates. Thirdly, in answer to the argument that a special custom to entail might be good, it was pointed out that the statute De Donis was made in 1285, that is within the time of legal memory, so that no such custom could legally arise. Fourthly, as the statute De Donis obviously contemplates only hereditaments which can be given by charter, it cannot include copyholds which cannot be so given. To these reasons the majority of the court in *Rowden v. Maltster* in 1627 assented;[6] and they added the very pertinent reason that, as at the time of the passing of the statute and for some time after, copyholders were mere tenants at will, it was not likely that the framers of the statute intended to include them.[7] On the other hand, it is fairly clear that estates tail of copyholds were known to Littleton, and that he recognized, both their validity,[8] and the validity of a plaint in the manorial

[1] Glover v. Cope (1692) 1 Salk. 185.

[2] "But it was agreed by them, that other statutes made at the same Parliament (1285), which are beneficial for the copyholder, and not prejudicial to the lord, may be, by a favourable interpretation, extended to copyholds, as cap. 3 which gives the wife a *cui in vita* and receipt," 3 Co. Rep. at f. 9a.

[3] "Whether an estate tail, or an estate tail after possibility of issue extinct, which hath a necessary depending upon an estate tail, may by any particular custom be allowed, that I may dispute, but cannot determine, for it is *vexata quæstio*, much controverted, but nothing concluded," Copyholder § 47; it is clear from Gravenor v. Todd (1593) 4 Co. Rep. f. 23a that Coke regarded the question as still unsettled.

[4] Heydon's Case (1584) 3 Co. Rep. at ff. 8a-9a.

[5] For this, the original meaning of the term perpetuity, see above 197.

[6] Cro. Car. 42.

[7] At p. 45.

[8] "Tenant by copy of the court roll is, as if a man be seised of a manor, within which manor there is a custom . . . that certain tenants within the same manor have used to have lands and tenements to hold to them and their heirs in fee simple, *or fee tail*, or for term of life etc.," Litt. § 73.

court in the nature of a formedon in the descender.[1] It is clear, too, that Plowden thought that the statute De Donis applied to copyholds.[2] It was certain that in fact manorial usage recognized these estates, and recognized that, as at common law, there might be remainders after these estates.[3] Moreover, the argument that to allow such entails of copyholds would be to allow perpetuities was not well founded, because, already in the sixteenth century, it was "a common usage (in manorial courts) by a recovery to dock entails of copyhold, or to defeat these estates by presentment that the copyholder hath committed a forfeiture, and so the lord to seize, and then to surrender it to the purchaser."[4] Authority and usage were too strong for the logical arguments of those who held that there could be no entails of copyholds. "Quod fieri non debet factum valet." Partial effect was given, at once to the claims of logic and to the claims of authority and usage, by the rule, favoured by Coke,[5] that, though generally a gift of copyholds to a man and the heirs of his body creates only a fee simple conditional at common law, yet, if a special custom of the manor to entail be proved, it will create an estate tail.[6]

Similar difficulties arose in the application to copyholders of some of the doctrines of common law as to the limitation of estates, and as to seisin. It was recognized that the conditions under which copyhold estates were held or conveyed made some relaxation in these doctrines logically necessary. Thus, "in grants at the common law, if the grantee be not in *rerum natura*, and able to take by virtue of the grant presently upon the grant made, it is merely void: but in customary grants upon surrenders it is otherwise: for, though at the time of the surrender the grantee is not *in esse*, or not capable of a surrender; yet if he be *in esse* and capable at the time of the admittance, that is sufficient. . . . The reason of the law is this; a surrender is a thing executory, which is executed by the subsequent admittance, and nothing at all is invested in the grantee, before the lord hath admitted him according to the surrender; and therefore if at the time of the admittance the grantee be in *rerum natura*, and able to take, that will serve."[7] So too, "a feme covert may receive a copyhold estate by surrender from her husband, because she cometh not in

[1] Litt. § 76, cited above 298 n. 8.

[2] Basset and Morgan v. Manxel (1564) Plowden App. at p. 2.

[3] Coke, Copyholder § 48; cp. Taylor v. Shaw (1665) Carter 22 *per* Bridgman, C.J.; vol. ii 381.

[4] Coke, Copyholder § 48.

[5] "But if the custom of the manor doth warrant such estates . . . then the custom co-operating with the statute makes it an estate tail, so that neither the statute without the custom, nor the custom without the statute, can create an estate tail," Heydon's Case (1584) 3 Co. Rep. at f. 8b; Co. Litt. 60a, b.

[6] Challis, Real Property (3rd ed.) 299-301.

[7] Coke, Copyholder § 35.

immediately by him, but by mediate means, viz. by admittance of the lord according to the surrender."[1] A surrender could have no tortious operation: it could only pass what the surrenderor could convey, so that it could not work a discontinuance.[2] Similarly, the doctrine that a descent cast could toll an entry had no application to copyholds.[3] On the other hand, it was held that, if copyholds were entailed, and a recovery was suffered in the manorial court by a plaint in the nature of a real action, this operated as a discontinuance, tolled the entry of the heir in tail, and so barred the estate tail.[4] Later it was held that an estate tail could be barred without alleging any special custom to that effect,[5] and that a custom to restrain the suffering of a recovery was void.[6] Similarly, it was held that the common law rules as to the waiver of a forfeiture by distraint for rent, or other acts which acknowledged the continuance of the tenancy, applied to copyholds.[7]

Thus the main principles of the modern law as to copyholds were constructed by the judges out of manorial customs which they censored, interpreted, and, when necessary, supplemented, by the doctrines of the common law. We shall now see that, just as in constructing the main principles of the law they harmonized the rules of manorial custom and the principles of the common law, so in the construction of that part of the law which regulated the relations of lord and tenant, they aimed at harmonizing and giving due recognition both to the custom of the manor and to the will of the lord.

(2) *Lord and Tenant.*

"Although a copyholder has in judgment of law but an estate at will, yet custom has so established and fixed his estate, that by the custom of the manor it is descendible, and his heirs shall inherit it, and therefore his estate is not merely *ad voluntatem domini*, but *ad voluntatem domini secundum consuetudinem manerii.*"[8] In order to ascertain the way in which the common law has managed to effect some sort of reconciliation between these

[1] Coke, Copyholder § 35; and for another illustration of a divergence from the rules as to the limitation of freehold estates, see Wade v. Bache (1668) 1 Wms. Saunders 149.

[2] Bullock v. Dibley (1593) 4 Co. Rep. 23a; for the tortious operation of a feoffment, see above 46.

[3] Gravenor v. Todd (1593) 4 Co. Rep. 23a.

[4] Dell v. Rigden (1594) 4 Co. Rep. 23a.

[5] White v. Thornborough (1715) 2 Vern. at p. 704; Moore v. Moore (1755) 2 Ves. Senr. at pp. 601-602.

[6] "If you will allow a customary tail, you must allow customary recovery," *per* Bridgman, C.J., Taylor v. Shaw (1665) Carter at p. 23.

[7] Coke, Copyholder § 61.

[8] Brown's Case (1581) 4 Co. Rep. at f. 21a.

somewhat conflicting conditions of the copyholder's tenure, we must look, firstly, at the manner in which the lord's will was eliminated in all matters connected with the disposition and descent of the copyholder's estate, and his rights in respect of it; and, secondly, at the rights in respect of the copyholder's estate, and the incidents attached to it, which the law secured to the lord.

(i) The lord or his steward was called on to act on the occasion of a disposition by the lord of copyhold land, on the occasion of a disposition by a copyholder, and on the descent of a copyhold, because, in all these cases, the new tenant must be admitted by him. The general principles applicable to his activities are thus described by Coke:[1] "In voluntary admittances the lord is an instrument: for though it is in his power to keep the land in his own hands or to dispose of it at his pleasure, and to that intent he may be reputed as absolute owner; yet because in disposing of it he is bound to observe the custom precisely in every point, and can neither in estate nor tenure bring in any alteration, in this respect the law accounts him custom's instrument." Hence, although the lord was under a personal disability, and although he had but a limited estate in the manor, his acts were valid.[2] On the other hand, he must have some estate; and, therefore, if he was a disseisor his grants would be avoided on the entry of the disseisee, or on the recovery of the estate by action.[3] On the other hand, in the case of an admittance upon a surrender or on a descent, "the lord is used as a mere instrument, and no manner of interest passeth out of him; and therefore neither in the one nor the other is any respect had unto the quality of his estate in the manor; for whether he hath it by right or by wrong it is not material, these admittances shall never be called in question for the lord's title, because they are judicial acts, which every lord is enjoined to execute."[4] It followed that the lord had power to admit only in accordance with the terms of the surrender; and that any variation made by the lord—e.g. if he imposed a

[1] Copyholder § 41.

[2] "In voluntary grants made by the lord himself the law neither respecteth the quality of his person nor the quantity of his estate," ibid § 34; Clarke v. Pennifather (1584) 4 Co. Rep. 23b; Co. Litt. 58b.

[3] "If the lord, or he (whosoever he be) that maketh a voluntary grant by copy, hath no lawful interest in the manor, but only an usurped title, his grant shall never so bind the right owner, but that upon his entry he may avoid them; otherwise we should make custom an agent in a wrong, which the law will never suffer," Copyholder § 34; Clarke v. Pennifather (1584) 4 Co. Rep. at f. 24a; Co. Litt. 58b.

[4] Copyholder § 41; "the only difference between an admittance on a surrender and admittance, and on a descent, was that in the former case nothing was vested in the grantee before admittance, while in the latter the heir was tenant immediately on the death of his ancestor, and for some purposes "the law taketh notice of him as a perfect tenant of the land," ibid.

condition—was void.[1] It followed, also, that the estates so created on these admittances could not be subject to any charges or incumbrances on the lord's estate;[2] and that nothing that the lord could do would affect the copyholder's estate.[3] Even if he sold the freehold of the land held by copy to another, so that it ceased to be part of the manor, the copyholders' estates would still continue. The only effect of such a transaction was that, as a result of the severance, the lands ceased to be parcel of the manor, so that, on the one hand, the copyholder was released from suit of court, but, on the other, lost all power of alienation, because there was no court at which he could make surrenders and admittances.[4]

The same principle was followed with regard to the rights conferred on a copyholder in respect of his estate. Whatever the disabilities of the lord, a grant by him carried with it all the privileges conferred on the copyhold tenant by the custom of the manor. Thus in *Swayne's Case*,[5] a manor was leased with an exception of the trees and underwood. It was a custom of the manor that copyholders could take trees growing on their holdings for fuel and to make fences. The lessee granted land to a copyholder; and it was held that, though the lessee was barred from taking wood, the copyholder could take it. "Notwithstanding the severance by the exception . . . yet such grantee by copy should have estovers; for the estate of the copyholder (who comes in by voluntary grant) is not derived out of the estate or interests of the lord of the manor; for the lord of the manor is but an instrument to make the grant."[6]

On the other hand, the grants made by the copyholder were subject to the ordinary rules of law. He must be capable of disposition; and he could not convey a greater estate than he had.[7]

[1] Westwick v. Wyer (1591) 4 Co. Rep. 28a.

[2] Anon. (1584) 4 Co. Rep. 24a; Taverner v. Cromwell (1584) 4 Co. Rep. 27a.

[3] Lane's Case (1596) 2 Co. Rep. at ff. 17a, 17b.

[4] "That after severance the copyholder shall pay his rent to the feoffee, and also shall pay and do other services which are due without admittance or holding of any court . . . ; but suit of court, and fine upon admittance or alienation are gone; for now the land or tenement cannot be aliened; for as the copyholder has some benefit by his severance, as appears before, so has he great prejudice, for now he cannot surrender or alien his estate," Murrel v. Smith (1591) 4 Co. Rep. at f. 24b; this view of the law seems to have been accepted by the Real Property Commissioners (1832) Third. Rep. 20; and, according to this view, all that could be done was to convey an equitable estate, or to apply to the court of Chancery for a decree, Phillips v. Ball (1859) 6 C.B.N.S. at p. 829; but in Bell and Langley's Case (1587) 4 Leo. 230 it had been held that, in such a case, the copyholder's heir could dispense with admittance; and in Phillips v. Ball *ubi sup.* at pp. 837-838 *per* Willes, J., this case was used to prove that he could aliene by a common law conveyance; and this, as Willes, J., pointed out, is really the logical consequence of the view that the act of the lord cannot prejudice the rights of the tenant.

[5] (1609) 8 Co. Rep. 63a.

[6] At f. 63b.

[7] "In grants made by copyholders, as the law respecteth the quality of the copyholder's estate; so doth it respect both the quality of his person, and quantity of his

(ii) The freehold of the land was in the lord, and the tenant held at his will. In the days when the lord really held a court for his manor, in which he perhaps exercised a wider jurisdiction than the merely manorial jurisdiction,[1] the lord's will might be a very real thing. Even when this court began to decay, and when copyhold conveyancing business became its chief business, the lord's will was not wholly eliminated. Some of the incidents of copyhold tenure gave him powers over the tenants which he might use harshly or not as he pleased; and the number of cases in which he could claim that the copyhold was forfeited put considerable discretionary powers into his hands.

The incidents of copyhold tenure which might be used oppressively were the right to take a heriot on the death of his tenant, and the right to impose fines. A heriot was the best beast or the best chattel of the tenant which, either by special reservation or more usually by custom, the tenant's representatives were obliged to surrender on his death.[2] Fines were the sums which every incoming tenant was obliged to pay for his admission. They were sometimes fixed in amount, but were usually arbitrary; and it is said that they are presumed to be arbitrary, unless a custom to the contrary is proved.[3] But we have seen that the common law courts had insisted that, though arbitrary, they must be reasonable.[4] Very generally a reasonable fine was fixed at two years improved value of the property.[5] But it would seem that, though the common law courts laid down sound principles, they were not always carried out in practice. Francis North, who in his youth had acted as steward of his grandfather's and other person's manors, used to say that, "the greatest trouble he had in those affairs was to satisfy some greedy lords, or rather ladies of manors, in settling the fines, and in being in some manner an executioner of their cruelty upon poor men."[6]

estate," Coke, Copyholder § 34; and this rule applied to a lord who had a limited estate in the copyhold by a gift from the copyholder, e.g. if the copyholder in fee surrendered to the lord for life, remainder over, ibid.

[1] Vol. i 184, 185.

[2] Coke, Copyholder § 24; Coke points out that "this our heriot is two-fold; heriot service, heriot custom. Heriot service is that heriot which is never due without special reservation and is seldom reserved upon any less estate than an estate of inheritance. Heriot custom is that heriot which is never due upon special reservation, but is challenged upon some particular custom, and is usually paid upon an estate for life and for years, as well as upon an estate of inheritance"; for the lord's rights of seizure see above 300 n. 3; it cannot be claimed from a tenant who holds a merely equitable estate, such as a mortgagor, Copestake v. Hoper [1908] 2 Ch. 10.

[3] See Lord Gerard's Case (1616) Godbolt 265; but it would seem from the case of Allen v. Abraham (1613) 2 Bulstr. 32 that the onus was on the party seeking to prove certainty or uncertainty, and that there was no presumption.

[4] Above 299.

[5] Real Property Commission (1832) Third Rep. 15; in Dow v. Golding (1630) Cro. Car. 196 the court thought one and a half years value reasonable and two and a half unreasonable; cp. Allen v. Abraham (1613) 2 Bulstr. 32.

[6] Lives of the Norths i 31.

The causes for which a copyholder might incur the penalty of forfeiture were numerous. If the heir did not appear to be admitted after three proclamations; if the tenant refused to be sworn of the homage, or, being sworn, refused to make presentments; if he swore in court that he was not the lord's copyholder; if he defaced the court roll which proved his position as copyholder; if he sued a replevin against his lord; if he refused to pay an accustomed fixed fine; if he refused to pay rent; if he committed voluntary or permissive waste; if he aliened by deed; or if he were outlaw or excommunicate—all these various acts were causes of forfeiture.[1] No doubt some of these causes of forfeiture became obsolete by reason of the decay of the manorial court. But many remained operative; and the fact that the lord had the right to declare the property forfeit, coupled with the fact that he had a wide power to give or withold licences to his tenants to make dispositions—e.g. to lease for a term of years—which, without such licence, were a cause of forfeiture, made his will a very real thing.

We have seen that the settlement made by the judges and statesmen of the sixteenth century of the then thorny question of the position of the copyholder, was politically a wise and an equitable settlement.[2] It reconciled on a fair basis the conflicting claims of lords and tenants. But the technical working out of this compromise, and its translation into definite and detailed rules of law, was a work of very great difficulty. The judges did their best. But a body of law made up partly of manorial custom, and partly of common law; administered by the decadent manorial court under the supervision of the central courts; and aiming at giving due weight, not only to custom and the common law, but also to the tenant's rights and the lord's will; was hardly likely to be very satisfactory. It was not satisfactory when Roger North wrote; and he thought that it ought to be abolished[3]—as he said, "it was somewhat unequal when the Parliament took away the royal tenures *in capite*, that the lesser tenures of the gentry were left exposed to as grievous abuses as the former."[4] It grew less satisfactory as it grew more elaborate; and, when economic conditions changed, it became a mischievous anachronism. It is for this reason that its recent history is mainly the history of expedients for its extinguishment.

[1] Coke, Copyholder §§ 57, 58; as to forfeiture for waste see Clifton v. Molineux (1585) 4 Co. Rep. 27a.

[2] Vol. iii 211-213.

[3] "If it were only to relieve the poorest of the landowners of the nation from such extortions and oppressions without more, there is reason enough to abolish the tenure," Lives of the Norths i 31.

[4] Ibid.

(3) *The Extinguishment of Copyhold Tenure.*

The leading defects of this system of copyhold tenure were admirably summed up by the Real Property Commissioners in 1832. I shall, in the first place, give a brief summary of their conclusions, as they show very clearly the results of the working of the principles which have just been discussed; and, in the second place, I shall say something of the manner in which copyhold could be got rid of at common law, and of the measures which have been proposed, or have been taken to hasten its extinguishment.

(i) The following were and are some of the chief defects of this system of copyhold tenure:—Firstly, the customs of different manors were very numerous and very various; and this led to frequent litigation, "between lord and tenant, between vendor and purchaser, and between persons claiming adversely the same interest."[1] "Each manor," said the Commissioners,[2] "has for itself a system of laws to be sought in oral traditions, or in the court rolls or proceedings of the customary court, kept often by ignorant or negligent stewards. In some manors the customs are reduced into writing in the shape of a Custumary on the presentment of the homage, or by an Act of Parliament; but little benefit is generally derived from these rude attempts at codification." Secondly, as freeholds and copyholds were often intermixed, it was often difficult to find out whether a given piece of land was freehold or copyhold. In order to give a purchaser security of title it was sometimes necessary to make both a freehold and a copyhold conveyance of the same land. A mistake as to the tenure might have serious consequences, as, if a mine were opened or timber cut under the erroneous impression that the land was freehold, it was a cause of forfeiture.[3] Thirdly, the rules as to minerals and timber, under which neither lord nor tenant could make any use of them except by mutual agreement, "directly interfered with the profitable enjoyment of the soil, and materially diminished the public wealth."[4] The arbitrary fines payable on alienation and descent had the same effect. The principles upon which the amount payable was calculated were not in all cases settled; and the rule that two years improved value could be charged, amounted in substance to "a tax on the capital of the tenant laid out in improvement." Hence

[1] Report 15. [2] Ibid 14. [3] Ibid 15.

[4] Ibid; the commissioners say that, "in consequence of the law with respect to timber, generally speaking, no young tree is allowed to stand on copyhold land; and there is a common proverb, that 'the oak scorns to grow except on free land.' It is certain that in Sussex and in other parts of England, the boundaries of copyholds may be traced by the entire absence of trees on one side of a line, and their luxuriant growth on the other," ibid.

improvements were seldom made.[1] Fourthly, the lord's rights in respect to heriots led "not only to ill-will and strife between neighbours, but to constant fraud and evasion. To defeat the claim of the lord, the legal estate is placed in the name of a person whose residence will prevent the lord from exercising his right. When a yeoman is supposed to be *in extremis* his family sell his cattle at a sacrifice or drive them out of the manor. The steward, on the other hand, makes irregular entries on the roll, and procures irregular presentments by the homage, of heriots being due on the death of tenants, and of payment being excused or compromised, with a view to make evidence to extend the lords claim on some future occasion."[2] Fifthly, the fees payable to the steward on every step taken in the lord's court, were a very heavy burthen on all dealings with the land.[3] Sixthly, the copyhold tenant got a little compensation from the fact that the land was not legally liable to his debts in his lifetime or after his death. But this immunity was, the Commissioners justly said, "a reproach to the law."[4] Practically the only points in which the law as to copyhold showed any superiority over the law as to freehold, were the fact that the court rolls provided a register of title, and the fact that the widow's rights to dower formed no impediment to alienation.[5]

(ii) It is obvious that these defects made the speedy extinguishment of copyhold tenure expedient. It was, in fact, possible to extinguish it at common law. This extinguishment could take place by act of the lord, e.g. if the copyhold escheated and he granted it away by deed; or by act of the law, e.g. if the copyhold escheated and the land was assigned as dower to the lord's widow; or by the act of the copyholder, e.g. if he accepted a feoffment or a lease for years at common law of the copyhold.[6] The lord also could enfranchise the copyhold by the release of his seignorial rights. But by none of these methods was the copyhold tenure completely extinguished, unless the lord was seised in fee;[7] and, as most lands were in strict settlement, few

[1] Report 15. [2] Ibid 19.

[3] Ibid 16; Roger North, Lives of the Norths i 31, said, "In very good earnest it is a miserable thing to observe how sharpers that now are commonly court keepers pinch the poor copyholders in their fees. Small tenements and pieces of land that have been men's inheritances for divers generations, to say nothing of the fines, are devoured by fees."

[4] Report 16. [5] Ibid 16, 17.

[6] Coke, Copyholder § 62; French's Case (1576) 4 Co. Rep. 31a; for modes in which the copyholder's interest could be extinguished see Watkin's Copyholds (3rd ed.) 545-555; in these cases the tenure did not necessarily disappear as the land could be granted out as copyhold again.

[7] Conesbie v. Rusky (1596) Cro. Eliza. 459*; 2 Rolle, Ab. 271; Watkins, Copyholds (3rd ed.) i 557-558. The crown, in the seventeenth century, sometimes tried to raise money by enfranchising copyholds, just as, in the sixteenth century, it raised

lords were seised in fee; so that enfranchisement was impossible, unless a special power to enfranchise had been inserted in the settlement.[1] If, however, enfranchisement was possible, either because the lord was seised in fee or under a power, and the lord enfranchised, the result was that the tenant held his land by socage tenure; but, owing to the operation of the statute Quia Emptores, not of his lord but his lord's lord—that is, generally of the crown.[2] It is clear that these methods of extinguishing copyhold tenure were wholly insufficient; and therefore it is not surprising to find that the Real Property Commissioners reported in 1832 that "a considerable proportion of the land in this country"[3] was still held by this tenure.

The Commissioners found themselves unable to recommend the compulsory abolition of copyholds.[4] They considered that all that could be done was to give facilities for voluntary enfranchisement, and to improve the existing law in some respects. Thus, they suggested that all peculiar rules as to descent, dower, and curtesy should be abolished; that wills of copyholds should be made with the same formalities as wills of freeholds; that copyholders should be empowered to grant leases for twenty-one years without licence;[5] that copyholds should be liable for debts in the same manner as freeholds; that heriots should be commuted for a fixed payment and abolished; that a court customary should be able to be held for surrenders and admittances though no copyholder be present.[6] Some, but not all, of these suggestions for the improvement of the law have been carried out by later legislation. The suggestions for giving facilities for voluntary enfranchisement were carried out by the Act of 1841,[7] which was amended by Acts of 1843[8] and 1844.[9] A further step was taken in 1852,[10] when enfranchisement was made compulsory at the instance of either lord or tenant. This Act was

money by enfranchising villeins, vol. iii 506-507; thus we get a petition for, inter alia, the benefit of the enfranchisement of the crown's copyholds at Wakefield, S.P. Dom. 1623-1625, 389, clxxv 36; but it would seem that the measures taken to enfranchise were not always effectual, so that copyholders were reluctant to make these bargains, S.P. Dom. 1611-1618, 608, liv 72-74.

[1] Williams, Real Property (22nd ed.) 489—a power now given to the tenant for life under the Settled Land Acts.

[2] Chetwode v. Crew (1746) Willes at p. 619; Bradshaw v. Lawson (1791) 4 T.R. at p. 446; these cases were followed in In re Holliday [1922] 2 Ch. 698; the judgment of Astbury, J., in that case contains an illuminating discussion of the effect of the statute Quia Emptores; on this matter see vol. iii 81, 83-84.

[3] Report 14. [4] Ibid 17.

[5] The lord could licence the tenant to grant leases; but this was no material help towards improvement as "even if the lord is willing to grant a licence on reasonable terms, it often happens that he has only a partial interest in the manor, and the licence determines with his interest," Report 16.

[6] Report 17-20. [7] 4, 5 Victoria c. 35.

[8] 6, 7 Victoria c. 23. [9] 7, 8 Victoria c. 55.

[10] 15, 16 Victoria c. 51.

amended in 1858[1] and 1887;[2] and the law on this subject is now contained in the consolidated Act of 1894.[3] As the result of the provisions of these Acts copyhold tenure so rapidly diminished, that the Law of Property Act has been able to do what Roger North in the seventeenth century, and the Real Property Commissioners in the nineteenth century thought eminently desirable —provide for its compulsory abolition.

§ 9. Incorporeal Things

We have seen that the mediæval common law is remarkable for the number and variety of the incorporeal things which were recognized by it;[4] and we shall see that this characteristic of mediæval law left traces which were still apparent in the law of the eighteenth century. We have seen also that the reason for the number and variety of these incorporeal things is to be found, partly in the fact that in the thirteenth century the law of contract was as yet rudimentary, and partly in the fact that the land law and the real actions, which protected various interests in the land, were comparatively highly developed.[5] But, though all through the mediæval period and later, the incorporeal things recognized by English law were very miscellaneous, at the end of the mediæval period certain of these incorporeal things, which were closely related to the land law, were becoming distinct; and certain rules relating to them were beginning to emerge. Thus we have seen that a good deal of law was growing up round such things as advowsons, commons, rents, annuities, and corrodies;[6] that the conception of an easement was emerging[7] and that the leading principles underlying prescription at common law had been evolved.[8] During this period the incorporeal things which were closely related to the land tended to increase in importance, and the law relating to them grew more definite. On the other hand, a changed order of political ideas tended to reduce to minor importance such incorporeal things as offices and franchises. At the same time a changed economic order, which tended to substitute contractual for proprietary relations, and changes in legal procedure, which made an action on a contract a far better remedy than a real action for an incorporeal thing, tended to reduce to insignificance such things as annuities and corrodies. But, throughout the sixteenth and seventeenth centuries, all these classes of incorporeal things still flourished and gave rise to litigation; the rules by which they were governed were elaborated by the

[1] 21, 22 Victoria c. 94. [2] 50, 51 Victoria c. 73. [3] 57, 58 Victoria c. 46
[4] Vol. ii 355-357; vol. iii 137-138.
[5] Vol. ii 356; vol. iii 151-152, 153, 454.
[6] Vol. iii 138-153. [7] Ibid 153-157. [8] Ibid 166-171.

decisions of the courts; and therefore during this period we get some attempts to classify them. These attempts at classification helped to bring out the differences between the more important of these incorporeal things, and thus lay the foundation for the modern rules relating to them. Of these attempts at classification, therefore, and their results, I shall speak in the first place.

One result of this process of classification was to elucidate the characteristics of that class of incorporeal things known as easements. We have seen that these things were known to the mediæval common law;[1] but that the law had not then evolved any very definite rules relating to them. Partly by the help of the Roman rules as to servitudes which Bracton had copied, and Coke had adapted from his book, partly as the result of a change in the nature of the remedies by means of which the rights to these easements were protected,[2] the common law began to attain some more definite rules as to the nature and characteristics of easements. But we shall see that, even when Blackstone wrote, these rules were scanty.[3] It was not till the decisions of the nineteenth century, upon the many problems resulting from the industrial revolution of the latter years of the eighteenth century that our modern law was created on the basis partly of the older rules, and partly of a further reception of Roman rules. In the second place, therefore, I shall speak of the development of the law of easements.

Lastly, I shall say something of the history of prescription. We have seen that in the mediæval period the common law had already come to recognize that certain incorporeal things could be acquired by prescription.[4] We shall see that the history of the development of this doctrine is curious, and that the courts and the Legislature have combined to make it one of the least satisfactory parts of this branch of the law.[5]

The Classification of Incorporeal Things

In the sixteenth century certain principles of classification in the miscellaneous mass of incorporeal things known to English law were beginning to emerge; and in the rules of law upon which these principles were based we can discover some of the origins of our modern law. In the first place, therefore, I shall say something of these principles. In the second place, I shall discuss the reasons for the disappearance of some of these classes of incorporeal things. In the third place, I shall describe shortly the later development of those which have continued to possess

[1] Vol. iii 153-157. [2] Above 21-22; below 325, 330-331. [3] Below 322-324.
[4] Vol. iii 166-171. [5] Below 343-352.

a permanent importance in the land law—the servitudes of English law.

(1) *Principles of classification.*

Firstly, there was a class of incorporeal things, which were not appendant or appurtenant, but existed as independent things. They were, in other words, always held in gross. Instances of these things were offices and franchises. We have seen that these hereditary offices were well known in all the courts, and in fact in all branches of the government central and local.[1] They were objects of property of so distinct a nature that land, and even another office, could be appurtenant to them. "And so it is held in 1 H. 7[2] that land may be appurtenant to an office of forestership, and it is there held by all the justices that land may appertain to an office, as to the office of warden of the Fleet, and the like, and the reason is because they who have had the office have always had the land, so that continuance is the cause thereof. And the Master of the Rolls has a house appertaining to his office. And several farms are appurtenant to the office of warden of the castle of Colchester by reason of usage and continuance. And so one office may be appurtenant to another, as here in this court the custos brevium gives one of the offices of the prothonotaries, and so the judges, in respect of their offices, have the disposal of certain offices by virtue of use and continuance."[3] Naturally a good deal of law grew up as to the assignability of these offices, and as to their capacity to be exercised by deputy;[4] as to the estates which could be created in them;[5] as to causes of forfeiture;[6] and as to the manner in which the profits incidental to them could be claimed.[7] Similarly franchises could exist as independent incorporeal things. Thus in *Sury v. Pigot*[8] it was pointed out that the franchise of warren was distinguishable from such incorporeal things as ways or commons, by the fact that it was not extinguished by unity of possession, "because a man may have a warren in his own land."[9]

[1] Vol. i 90-94, 246-251. [2] Y.B. 1 Hy. VII. Trin. pl. 6 at p. 29.

[3] Hill v. Grange (1557) Plowden at p. 169; cp. Withers v. Iseham (1553) Dyer at f. 71a; Co. Litt. 121b.

[4] Earl of Shrewsbury's Case (1611) 9 Co. Rep. at ff. 47b-50a.

[5] Jones v. Clerk (1655) Hardres 46; Veal v. Priour (1664) ibid 357.

[6] Earl of Shrewsbury's Case (1611) 9 Co. Rep. at ff. 50a, 50b.

[7] Withers v. Iseham (1553) Dyer, 70b; in that case it was argued that rules existed (parallel to the rules respecting estates in the land) that only those who held offices of inheritance could prescribe for the profits incidental thereto, from which it was deduced that a man who held the office of the keeper of a park for life could not prescribe.

[8] (1625) Popham 166.

[9] Ibid at p. 170; or, as Crew, C.J., put it, "in our law every case hath its stand or fall from a particular reason or circumstance: for a warren and tythes they are not extinguished by unity because they are things collateral to the land."

Secondly, we have seen that certain incorporeal things were regarded as being "as of common right." They were regarded as natural incidents to the tenure of land.[1] Thus the right of a tenant for life to reasonable botes and estovers, the right of a tenant of the manor to common in the waste of the manor, the right of the lord of whom the land was held to his services, were all "of common right," and appendant to the holding.[2] As we have seen, the distinction between things which were thus "of common right," and things, like rights appurtenant or easements, which were not, gave rise to differences in the manner in which such things could be claimed. It was not necessary to prove a special grant of them or to prescribe for them, for, once the tenure and the estate had been established, these rights were annexed to it by law.[3]

Thirdly, perhaps the commonest, and certainly the most permanently important, class of incorporeal things, were the things "against common right," which had been made appurtenant to land by grant express or implied, or by prescription. The mediæval common law had recognized that a very large number of rights could thus be made appurtenant. Thus "advowsons, villeins, ways, commons, courts, piscaries, and the like," might be made appurtenant to land.[4] But a landowner's power to make these things appurtenant to land was subject to two limitations: firstly, "nothing can be appurtenant to another, but where it is of another nature and substance," so that a corporeal thing could not be appendant or appurtenant to a corporeal thing, or an incorporeal thing to an incorporeal; and, secondly, that the incorporeal appendage must have some definite relation to the use of its corporeal principal, so that a common of turbary cannot be appendant to land, but must be annexed to a house, for "turfs are to be spent in an house."[5] We shall see that these limitations on a landowner's power to make certain incorporeal things

[1] Vol. iii 168-169.

[2] Luttrel's Case (1601) 4 Co. Rep. at f. 86a contemplates a case where a man has estovers as "appendant to ancient house."

[3] Vol. iii 168-169.

[4] Hill v. Grange (1557) Plowden at p. 170.

[5] Ibid; "prescription . . . doth not make anything appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant. As a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal which lie in grant, as advowsons villeins commons and the like, may be appendant to things corporeal, as a manor house or lands; or things corporeal to things incorporeal, as lands to an office. But, yet, as hath been said, they must agree in nature and quality; for common of turbary or of estovers cannot be appendant or appurtenant to land, but to a house, to be spent there; nor a leet that is temporal to a church or chappel, which is ecclesiastical," Co. Litt. 121b; Tyrringham's Case (1584) 4 Co. Rep. at ff. 36b, 37a.

appurtenant to land, have resulted in a very definite rule as to the extent of the rights conferred by them.[1]

Fourthly, certain of these incorporeal things could be either appurtenant to land, or could be granted to a person irrespective of his ownership of land—they could be rights in gross. Thus villeins, advowsons, and such profits as rights of common of pasture or rights of fishing, could be rights in gross.[2] We shall see that the fact that they were no longer appurtenant to land removed the restrictions upon their extent involved in the fact that they were appurtenant to a particular tenement, and left the parties more free to fix their extent as they pleased.[3]

Fifthly, many of these incorporeal things were neither appendant nor appurtenant, nor did they originate in an express grant, but were dependent upon custom. In the first place, there were the large class of incorporeal rights which belonged to the copyholder by virtue of the custom of the manor.[4] They were similar in character to the freeholder's rights, and the rules which governed them tended to become assimilated to these rights. The copyholder was allowed to claim these rights by custom as against his lord; and, if he wished to claim them as against another, he could claim them by prescribing in his lord's name.[5] In the second place, there were a large number of rights which belonged to the inhabitants of districts by virtue of local custom. But we have seen that the fact that inhabitants as such could not take a grant, was fatal to their capacity to acquire a profit by local custom.[6] However, just as it was necessary to allow a copyholder to claim by custom as against his lord, as otherwise his rights would have been at the mercy of his lord, so it was necessary to allow inhabitants to claim by custom rights in the nature of easements, as otherwise customary rights, which dated from a period long before the growth of these technical rules of the common law, would have been destroyed.[7]

These distinctions introduced a little order into this large mass of incorporeal things, which the law of this period had inherited from the mediæval common law. But the miscellaneous character

[1] Below 320-321; 331-332.
[2] Vol. iii 143-151; below 319-320.
[3] Below 320.
[4] Above 299, 306.
[5] "When the copyholder claims common or other profits in the lord's soil, then he cannot prescribe in the name of the lord; for the lord cannot prescribe to have common or other profit in his own soil; but then the copyholder, for as much as he cannot prescribe, neither in his own name nor in his lord's name, he must of necessity allege, that within the manor is such a custom as in the case at bar," Foiston v. Crachroode (1587) 4 Co. Rep. at f. 31b; Gateward's Case (1607) 6 Co. Rep. at f. 60b.
[6] Vol. iii 170-171.
[7] "A custom that every inhabitant of such a town shall have a way over such land either to the church or market, etc., that is good, for it is but an easement and no profit," Gateward's Case (1607) 6 Co. Rep. at f. 60b; below 324-326; note the untechnical use of the word "easement."

of these things, and the fact that detailed rules had grown up round many of them, made the law very complex. Such things, for instance, as offices, franchises, and villeins were the centres of a mass of detailed rules, which, from the sixteenth century onwards, were tending more or less rapidly to become obsolete. It was not until these things were abolished or disappeared, that the complexity of this branch of the law began to diminish. As we shall now see, even in the eighteenth century, most of the incorporeal things of the mediæval law were, in theory at any rate, still existing.

2. *The reasons for the disappearance of some of these incorporeal things.*

"Incorporeal hereditaments," says Blackstone,[1] "are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corrodies or pensions, annuities, and rents." Villeins have dropped out of the list of these incorporeal things;[2] but, subject to this modification, it would be safe to say that this list would have been far more intelligible to a mediæval than to a modern lawyer. Even when Blackstone was writing it was already more than half obsolete. No doubt all the incorporeal things which he enumerates were still known to the law. But it is quite clear that offices and franchises were things which had seen their best days. They were coming to be more and more obviously survivals of a past economic and political order. Then, too, such things as corrodies and annuities were almost if not quite obsolete. Even in the Middle Ages their similarity to merely contractual rights was beginning to attract attention; and, in the sixteenth century, it was said that an annuity granted *pro consilio suo impendendo*, was of so personal a nature, that on the attainder of the grantee, it could not be forfeited to the crown.[3] It was clear that, in Blackstone's day, the practice of granting such things as these had given place to the practice of making contracts for the periodic payment of a sum of money.

Other classes of incorporeal things were tending to become rare. The class of things which were "of common right,"[4] such as services due by reason of tenure, had been tending to disappear since the passing of the statute of Quia Emptores. Such rights as the right of the tenant for life to botes and estovers, were looked on, not as independent incorporeal things, but as incidents of the estate.[5] The one species of things of this class which remained was common appendant. Its characteristics had been

[1] Comm. ii 21. [2] See vol. iii 507-508.
[3] Sir Henry Nevil's Case (1570) Plowden at p. 381.
[4] Vol. iii 168-169. [5] See Co. Litt. 41b.

fairly completely defined in the Middle Ages; and, as we shall see, the results of the mediæval law had been summarized and fixed by the decisions of the sixteenth century.[1] But it, too, like other incorporeal things which were of common right, was of diminishing importance; for it must have existed from time immemorial, and it could not be newly created.[2]

Thus, apart from the incorporeal things of the ecclesiastical sort, such as tithes and advowsons, the most important class were those things appurtenant to land which gave rights over the land of another person. In other words, they were that class of incorporeal things which corresponded to the servitudes of Roman law. The principal distinction between the Roman servitudes—the distinction between prædial and personal—was reproduced in the distinction between rights appurtenant and rights in gross.[3] But we shall see that, though the distinction existed, it was not applied in the same way as it was applied in the Roman law.[4] Similarly, we shall see that, though Roman rules have been used to develop the law as to easements, that law rests at bottom upon native foundations;[5] and that, upon the rules relating to the other varieties of this class of incorporeal things, the influence of Roman rules has been practically non-existent.[6]

(3) *The servitudes of English law.*

The servitudes known to English law can be grouped under four main heads: they consist either in render—rents of various kinds; or in prender—profits a prendre; or they are profits or other rights belonging to copyholders, which depend upon the custom of the manor; or they are easements, or customary rights in the nature of easements.

(i) Of rents I need say but little. We have seen that the main varieties of rents had been ascertained when Littleton wrote.[7]

[1] Below 319.

[2] "In this case Wray, C.J., said, that common for cause of vicinage is not common appendant: but in as much as it ought to be by prescription from time whereof etc., as common appendant ought, it is this respect resembled to common appendant: but common appurtenant and in gross, may commence either at this day by grant, or be by prescription," Tyrringham's Case (1584) 4 Co. Rep. at ff. 38a, 38b; cp. Brooke, Ab. *Commoner* pl. 1 (26 Hy. VIII. 4).

[3] Thus rights, such as herbagium, which were in effect profits in gross, Co. Litt. 4b, were styled personal by Bracton, "Si fuerit incertum, ut si quis plus dederit, aliquando minus, haec esset potius emptio herbagii quam pastura, et hoc erit potius personale quam prædiale. Item eodem modo si quis temporibus ad voluntatem suam. Item herbagium dici poterit, si cui concedatur, quia non habet liberum tenementum ad quod pertinere possit," f. 221a.

[4] Below 320-321, 324-326; the personal servitudes of Roman law were rights in gross, not only over land, but over any non-fungible property; and some of those created over land, e.g. the usufruct, more nearly resembled an estate in the land; for the evolution of the theory of estates in English law see vol. ii 350-352; Bracton f. 220a.

[5] Below 321 seqq. [6] Below 319-321. [7] Vol. iii 151.

These rents were, as we have seen, regarded as things issuing from the land, and, according to the view of some sixteenth-century lawyers, they resembled corporeal rather than incorporeal things.[1] It is not therefore surprising that debt did not lie for rent reserved on a lease for life till 1709;[2] and then only if the rent was due from the tenant to his landlord. We have seen that for other rents personal actions did not lie till after the abolition of the real actions.[3]

(ii) The incorporeal things that lay in prender—the profits a prendre of English law—cover a wide field. The most important of these things are rights of common of various kinds; and of these rights of common the most important is common of pasture. Others are rights to be enjoyed in severalty; and of these rights, whether they are to be enjoyed in common or in severalty, some might be appurtenant to land, others were rights in gross.

We have seen that cases of the sixteenth century summarized and restated the law as to common of pasture.[4] *Tyrringham's Case*,[5] *Gateward's Case*,[6] and one or two others,[7] lay down the modern distinctions as to the varieties of common of pasture known to English law, and their main characteristics; and, as we have seen, in *Gateward's Case* the rule that inhabitants, being incapable of taking a grant, cannot prescribe for a profit, is finally stated.[8] Similarly the nature of common of shack, and some of the rules relating to it, were laid down in *Miles Corbet's Case*.[9] The results of these and other cases are stated by Coke in his commentary on Littleton.[10] It is clear from his treatment of the topic, that rights of common of pasture were still much the most important profit in which common rights existed; but he also recognizes that "there be divers other commons as of estovers, of turbary, of piscary, of digging for coals, minerals and the like."[11] As yet the law is comparatively scanty as to these other rights of common; and the same remark applies to profits granted to be enjoyed in severalty. But it is clear from the cases that such

[1] "And therefore it was said, there is *hæreditas corporata* and *hæreditas incorporata*. *Hæreditas corporata* is such as messuage, land, meadow, pasture, rents and the like, which have substance in them, and may continue always. But *hæreditas incorporata* is such as advowsons, villeins, ways, commons, courts, piscaries, and the like, which are or may be appendant or appurtenant to inheritances corporate," Hill v. Grange (1557) Plowden at p. 170; cp. vol. iii 97-101.

[2] Above 263.

[3] Ibid.

[4] Vol. iii 147-151.

[5] (1584) 4 Co. Rep. 36b.

[6] (1607) 6 Co. Rep. 59b; S.C. Cro. Jac. 152; cp. F.N.B. 179L-181N.

[7] Wyat Wild's Case (1610) 8 Co. Rep. 78b; Mellor v. Spateman (1669) 1 Wms. Saunders 343; Weekly v. Wildman (1699) 1 Ld. Raym. 405.

[8] Vol. iii 170.

[9] (1585) 7 Co. Rep. 5a; cp. Anon. (1541) Dyer 47b; Anon. (1573) Dyer 316b.

[10] Co. Litt. 122a.

[11] Ibid.

rights were recognized, and that they might be either appurtenant to land[1] or in gross.[2]

The question whether a profit was appurtenant or in gross had an important bearing upon the extent of the right which was or might be enjoyed by the person entitled to the profit. We have seen that it was well established that the incorporeal thing, which was made appurtenant to a corporeal thing, must have some relation to the user of that corporeal thing.[3] From this it followed that the extent of the appurtenant right must be measured by the needs of the land to which it was appurtenant. In the case of common of pasture, this was expressed by the rule that the common existed only for cattle levant et couchant on the land to which the common was annexed;[4] and a claim to a right of common appurtenant to an unlimited extent was disallowed.[5] So where a corporation prescribed for a right of common in gross, and did not limit their claim to cattle levant and couchant in the town, their claim was held to be bad for want of these words.[6] The same principle has been recently applied by the Court of Appeal to a common of piscary.[7] It was there held that a right "to fish without stint and for gain," claimed as appurtenant to certain free tenements in certain parishes, could not be supported; not only because no grant could be presumed of such a right, but also because "the very idea of a que estate seems to involve some relation between the needs of the estate or its owner, and the extent of the profit a prendre. A right in an indefinite number of people to take a profit a prendre without stint and for sale must tend to the entire destruction of the property."[8] Such a right cannot be a right appurtenant: it can only be supported as a right in gross.[9] We shall see that these principles, which were ascer-

[1] Dowglass v. Kendal (1610) Cro. Jac. 256; Spooner v. Day (1636) Cro. Car. 432; Hayward v. Cunnington (1665) 1 Lev. 231.

[2] Y.B. 5 Hy. VII. Mich. pl. 15; Sir Francis Barrington's Case (1611) 8 Co. Rep. 136b; Smith v. Kemp (1693) 2 Salk. 637.

[3] Above 315.

[4] Brooke, Ab. *Commoner* pl. 8 = Y.B. 15 Ed. IV. Trin. pl. 16; Tyrringham's Case (1584) 4 Co. Rep. at f. 37a; Leech v. Widsley (1669) 1 Ventris 54; Cheesman v. Hardham (1818) 1 B. and Ald. at p. 710 *per* Bayley, J.; cp. Bailey v. Stephens (1862) 12 C.B.N.S. 91 for the application of the principle to a right to cut and carry away wood.

[5] Valentine v. Penny Noy 145.

[6] Mellor v. Spateman (1669) 1 Wms. Saunders at p. 346; cp. Y.B. 15 Ed. IV. Trin. pl. 16.

[7] Lord Chesterfield v. Harris [1908] 2 Ch. 397.

[8] At p. 410 *per* Cozens-Hardy, M.R.; and see the cases cited by Buckley, L.J., ibid at p. 422; as he says, at p. 423, and as the cases show, "the man who prescribes in a que estate must, I think, prescribe for a profit a prendre limited by the character and wants of the estate in respect of which he prescribes."

[9] "Si jeo fuy seisie d'un acre de terre, a quel j'ay common appendant, jeo ne user[ai] non comon ove auters beasts, forsque ovesque ceux queux sont levants et couchants sur le dit acre . . . *cum quo concordat* opinio *Curiæ*. Mes *Pigot* dit que un

tained in this period with respect to the extent of the rights conferred by a profit appurtenant, have been later applied to determine the extent of the rights conferred by an easement.[1]

(iii) The profits or other rights belonging to copyholders, and depending upon the custom of the manor, fall into separate category. They are dependent upon custom, and upon the relation of the lord of the manor to his copyhold tenants. Hence, although these rights tended to follow the analogy of the rights which were recognized over freeholds,[2] they naturally developed certain peculiarities. Thus a copyholder must claim his profit as against the lord by virtue of a custom.[3] On the other hand, if he wished to establish a right by prescription as against any other person, he must prescribe in the name of his lord, on account of "the weakness and baseness of his estate."[4]

(iv) The definition of these various classes of incorporeal things helped to bring out into clearer relief the nature of easements, and customary rights in the nature of easements. We have seen that the nature of the classes of incorporeal things which have just been described, was fairly well ascertained in the Middle Ages;[5] but that the law relating to easements was still in a very uncertain state.[6] We shall see that, during the sixteenth and seventeenth centuries, their nature began to be better understood. But it is significant that Blackstone does not describe easements in general, and that the only easements which he mentions in his list of incorporeal things are various rights of way.[7] As we shall now see, it is not till after Blackstone wrote, that the rules as to easements, which had been evolved during this period, were elaborated and combined into a definite body of legal doctrine, which defined the incidents, both of easements in general, and of particular kinds of easements.

The Development of the Law of Easements

We have seen that both the term "easement," and the thing itself, were known to the mediæval common law; and that,

home poyt prescriber d'avoir comon as touts maners des avers assets bien par reason de son person," Y.B. 15 Ed. IV. Trin. pl. 16; "If I by deed grant all my trees within my manor of G. to one and his heirs, the grantee shall have an inheritance in them, without any livery and seisin," Liford's Case (1615) 11 Co. Rep. at f. 49b; Bailey v. Stephens (1862) 12 C.B.N.S. at p. 109 *per* Erle, C.J.; Lord Chesterfield v. Harris [1908] 2 Ch. at p. 421 *per* Buckley, L.J.; we have seen, above 318 n. 3, that the comparative uncertainty of these rights in gross was recognized by Bracton.

[1] Below 331-332.

[2] Thus, just as a person could establish an unlimited right in gross, so by the custom, copyholders might establish the right to a sole right to the pasture, exclusive of the lord, and irrespective of the number of cattle levant and couchant on their land, Hoskins v. Robins (1671) 2 Wms. Saunders 324, S.C. 2 Lev. 2.

[3] Above 299, 306.

[4] Foiston v. Crachroode (1587) 4 Co. Rep. at f. 31b.

[5] Vol. iii 143-153.

[6] Ibid 153-157.

[7] Comm. ii 35-36.

at the latter part of the sixteenth century, it was described in Kitchin's book on courts, and defined in the later editions of the "Termes de la Ley."[1] That definition is as follows: "An easement is a privilege that one neighbour hath of another by writing or prescription without profit, as a way or a sink through his land or such like." From the point of view of modern law, this definition is obviously defective in that it does not say that the "writing" must be under seal, and does not say anything about the existence of a dominant tenement.[2] But these defects in the definition are instructive, because they indicate that the law as to easements was as yet rudimentary. It is clear, however, that by the end of the seventeenth century the learning of easements was becoming somewhat more familiar to the lawyers. In 1695, in the case of *Peers v. Lucy*,[3] it was said in argument that "the word 'easement' is known in the law; it is defined in the terms thereof; it is a genus to several species of liberties which one man may have in the soil of another, without claiming any interest in the land itself; it is used in *Gateward's Case*, where it was held to be a good custom for an inhabitant of a certain parish to have a way over another man's ground, either to church or to the market, because it is an easement and no profit; it is used also by my lord Hobart, who makes a difference between interests and profits etc., such as rents and commons etc., and easements such as lights air etc., the last of which, though they may be destroyed and extinguished for a time by unity of possession (for a man may do what he pleases with his own), yet if no alteration be made thereof when it is in one hand, upon the dividing it again, the interest and right to such easement revives. My lord Dyer uses this word when he tells us that lessee for life or years or tenant at will, or an inhabitant of a parish who is tenant at will, cannot prescribe to a common in their own names, because of the meanness of their estates and capacity, but they may prescribe to be exempted from toll, or to have a way to church over another man's ground, because such are only easements. It is a word also used in pleading in almost all the Books of Entries, as in Coke, in Robinson, in Winch, in Vidian, in Herne, and it is mentioned also in Brownlow."

This statement makes it fairly clear that Blackstone's inadequate account of easements does not fairly represent the available learning on this topic. At the same time, the confusion which it shows between true easements and customary rights in the nature of easements, and its assertion of the possibility of reviving an easement destroyed by unity of seisin, would seem to show that

[1] Vol. iii 154 n 1; for Kitchin's book see vol. iv 120-121; for the Termes de la Ley see vol. v 401.

[2] Goddard, Easements (5th ed.) 4, 10.

[3] 4 Mod. at pp. 365-366.

some very elementary principles of our modern law were as yet not clearly recognized. In fact, right down to the beginning of the nineteenth century, there was but little authority on many parts of this subject. Gale, writing in 1839, said,[1] "the difficulties which arise from the abstruseness and refinements incident to the subject, have been increased by the comparatively small number of decided cases affording matter for defining and systematizing this branch of the law. Upon some points indeed there is no authority at all in English law;—of the decisions, some depend upon the circumstances of the particular case, and some are irreconcilable with each other." The industrial revolution, which caused the growth of large towns and manufacturing industries, naturally brought into prominence such easements as ways, water courses, light, and support; and so Gale's book became the starting point of the modern law, which rests largely upon comparatively recent decisions.

Nevertheless the leading principles, upon which this modern law is founded, come from all periods in the history of the common law; and some go back to a very early period in the history of that law. Bracton had incorporated into his book some of the Roman learning as to servitudes;[2] but in this, as in other branches of the law, this Roman learning had very little influence on the development of the mediæval common law. We have seen that such learning as the mediæval common law developed on this subject, centred round the assize of nuisance.[3] In the sixteenth and seventeenth centuries some of Bracton's borrowings from Roman law were copied by Coke,[4] and appear in the decisions of that period.[5] These Roman rules were, with some modifications, pieced on to the rules which had gathered round the assize of nuisance; and, when this remedy gave place to actions on the case,[6] a freer development of the law became possible. The law, as thus developed, sufficed for the needs of the country in the eighteenth century. But, as it was no longer sufficient for the new economic needs of the nineteenth century, an expansion and an elaboration of this branch of the law became necessary. It was expanded and elaborated, partly on the basis of the old rules, which had been evolved by the working of the assize of nuisance, and its successor the action on the case; partly by the help of Bracton's Roman rules; and partly, as Gale's book shows, by the help of the Roman rules taken from the Digest, which he frequently and continuously uses to illustrate and to supplement

[1] Easements, Preface to the first ed.
[2] Vol. ii 283-284.
[3] Vol. iii 154-157.
[4] See e.g. his passage on rights of way, Co. Litt. 56a; below 336-337.
[5] See e.g. Sury v. Pigot (1627) Popham at p. 170.
[6] Above 21-22; below 330-331.

the existing rules of law. In some cases, it is true, the rules which Gale drew from Roman law have not been followed; but in many more cases, where they were in accord with or at any rate not opposed to common law principles, they have been adapted to their new situation, and have thus helped materially to the making of our modern law.

These then are the conditions under which our modern law has grown up. In this section I shall trace the history, firstly, of the leading principles of the modern law; and, secondly, of certain rules relating to particular easements.

(1) *The leading principles of the law.*

The differentiation of easements from other rights analogous thereto was a condition precedent to the evolution of the modern law of easements. In fact, this differentiation and the evolution of the modern law were to some extent simultaneous processes. But it will perhaps conduce to a clearer understanding of the history of the law, if the two things are considered separately. I shall therefore consider, firstly, the differentiation of easements from other rights analogous thereto; and, secondly, the evolution of some of the principles of the modern law.

(i) The differentiation of easements from other rights analogous thereto.

It is now a well established rule of English law that there can be no such thing as an easement in gross.[1] An easement must be appurtenant to a dominant tenement. We have seen that this rule followed from the conditions under which the assize of nuisance, and other real actions[2] for the redress of injuries to incorporeal rights, lay. It was only a freeholder who could bring the assize; and it was not difficult to deduce from this rule of procedure the rule that only a freeholder could be entitled to the right. We have seen too that Bracton thought that servitudes of this kind must alwaysbe prædial,[3] that is appurtenant to a dominant tenement. The result seems to have been that, by the beginning of the sixteenth century, the better opinion was that an easement must be appurtenant—that there could be no such thing as an easement in gross. But, in spite of this opinion, the question whether or not there could be such a thing as an easement in gross has remained an uncertain question right down to the latter half of the nineteenth century; and the possibility of the existence of such an easement has been supported by text writers, and not decisively condemned by the judges.

It is probable that this doubt has arisen from a failure to dis-

[1] Vol. iii 154, 156-157; below 326. [2] Vol. iii 157. [3] Ibid 157 n. 3.

tinguish between easements proper, and customary rights in the nature of easements. We have seen that the existence of these customary rights was recognized in *Gateward's Case;*[1] and there is a line of cases throughout the seventeenth, eighteenth, nineteenth, and twentieth centuries in which these rights have been enforced.[2] The manner in which they were contrasted in *Gateward's Case* with profits a prendre, suggested, though it did not assert, a similarity between these customary rights, and rights of a similar character appurtenant to a dominant tenement;[3] and this was more especially the case with such rights as a right of way, which was closely parallel to a true easement. At the same time, the substitution of the action on the case for the assize of nuisance[4] as a remedy for the infringement of an easement, tended to emphasize this similarity. The remedy for the infringement of a true easement, and for the infringement of a customary right in the nature of an easement, being now the same, the distinction between these two different kinds of rights was naturally obscured. Thus Blackstone, when dealing with rights of way, seems to think that a way may be either granted to an individual or attached to a dominant tenement.[5] In *Dovaston v. Payne*[6] Heath, J., seems to have thought that a man who gave a public right of way created an easement in favour of the public;[7] Henry Willes, one of the editors of Gale on Easements, advocated the view that an easement in gross was possible;[8] and his views were cited by the court in *Mounsey v. Ismay*[9] without disapproval.

Two lines of thought seem to have combined to get rid of this

[1] Above 316 n. 7.

[2] Baker v. Brereman (1636) Cro. Car. at p. 419; Abbot v. Weekly (1676) 1 Lev. 176—a prescription for inhabitants to dance in another's ground; Fitch v. Rawling (1795) 2 Hy. Bl. 393—a custom for the inhabitants of the parish to play at games in the close of A; Mounsey v. Ismay (1865) 1 H. and C. 729—a custom for the freemen and citizens of a town to enter a close for the purpose of horse racing; Mercer v. Denne [1904] 2 Ch. 534, [1905] 2 Ch. 538—a custom for fishermen, inhabitants of a parish, to spread their nets to dry on the land of A.

[3] "So of a custom that every inhabitant of such a town shall have a way over such land, either to the church or market etc. That is good, *for it is but an easement* and no profit," (1607) 6 Co. Rep. at f. 60b.

[4] Above 21-22.

[5] "This may be grounded on a special permission; as when the owner of land grants to another a liberty of passing over his grounds, to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee leaves the country, he cannot assign his right over to any other; nor can he justify taking another person in his company," Comm. ii 35-36; clearly such a right of way is either a licence or a contractual right, and not an easement.

[6] (1795) 2 Hy. Bl. 527.

[7] "The property (in a public way) is in the owner of the soil, subject to an easement for the benefit of the public," ibid at p. 531; this is only true if we use the term "easement" in the same untechnical way as Coke used it, above n. 3; but naturally the two senses of the word—the old untechnical sense and the new technical sense, caused confusion.

[8] Gale, Easements (7th ed.) 11 n. (*c*).

[9] (1865) 3 H. and C. at p. 498.

confusion, by distinguishing easements properly so called which must be appurtenant to a dominant tenement, and customary rights in the nature of easements. Firstly, we shall see that, at the beginning of the nineteenth century, it was clearly laid down by Lord Brougham that the list of easements was closed ; and that it was not competent to landowners to annex to the user of property new incidents of their own devising.[1] We shall see, too, that it was also settled that the extent of an easement was limited by the needs of the tenement to which it was attached.[2] But if an easement in gross was allowed to be created, no such limitation of its extent was possible. It would therefore in effect be a new incident attached to the enjoyment of property, which could not be limited, as a customary right is limited, by reasonableness,[3] or as an easement is limited, by the needs of the dominant tenement. This, in effect, was the ratio decidendi in *Hill v. Tupper*,[4] in which it was held that a grant by a canal company of the sole right of letting pleasure boats for hire on the canal did not create a right of property in the grantee. Secondly, we have seen that Bracton had held the view that rights of this kind were always prædial.[5] Gale had called renewed attention to the rules of Roman law on which Bracton's text is based; and had distinguished from true easements appurtenant to a dominant tenement, both customary rights, and mere personal licences to use.[6] Both these lines of thought helped to call attention to the distinction which had been obscured by changes in the forms of action, and by a forgetfulness of the Roman rules which Bracton had stated. Effect was finally given to the distinction when Lord Cairns, in 1868, laid it down that, "there can be no easement properly so called unless there be both a servient and a dominant tenement. . . . There can be no such thing according to our law, or according to the civil law, as an easement in gross."[7]

The fact, then, that a true easement is a right of property attached to a dominant tenement, distinguishes it from a customary right in the nature of an easement. It also distinguishes it from a merely personal licence to use. We shall see that this distinction did not emerge clearly till the latter half of the seventeenth century; and that it has been somewhat confused, both by the existence of licences which are coupled with grants, and by the manner in which equity has modified common law rules.

In the fifteenth century the distinction between a licence, and the grant of an incorporeal right, was by no means clearly drawn.

[1] Below 333. [2] Below 331-332.
[3] See Gateward's Case (1607) 6 Co. Rep. at f. 60b.
[4] (1863) 2 H. and C. at pp. 127, 128 *per* Pollock, C.B., and Martin, B.
[5] Vol. iii 157 n. 3. [6] Easements (7th ed.) 9.
[7] Rangeley v. Midland Railway Co. L.R. 3 Ch. App. at pp. 310, 311.

In a case of the year 1480, Wood *arguendo* laid down the modern rule that a licence is always revocable;[1] and this, of course, clearly distinguished it from the grant of an incorporeal right. But Fairfax, J., immediately after put the case of a licence to pasture cattle, which would give "a right of action against any one who came on the land during the term."[2] This statement gives the clue to what has always been the difficulty with these licences: admitting that a licence is revocable, what is the position of a licence coupled with a grant? This difficulty emerged in 1620 in the case of *Webb v. Paternoster*.[3] In that case the plaintiff was licensed by Plumer to put some hay on to his land. Afterwards Plumer leased the land to Paternoster. Paternoster turned his cattle on to the land, and they ate Webb's hay. It was held that Webb had had a sufficient time to move his hay, and that therefore he had no cause of action. But a good deal was said by the court as to the nature of licences, and when they were, and when they were not, revocable. Various distinctions were drawn between licences for pleasure merely and licences for profit,[4] and licences executed and licences executory.[5] But Dodderidge, J., brushed these distinctions aside, and laid down the rule that all licences, which were merely licences, were revocable; and that it was only if the licence conferred a definite interest in property that it was not revocable.[6]

This view of the law was strengthened by the analysis of the nature both of a licence and of a licence coupled with a grant, which was made by Vaughan, C.J., in his famous judgment in *Thomas v. Sorrel*.[7] "A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own

[1] "En case que le plaintiff licence moy d'entrer en son meason, puis il poit moy discharge quant a luy pleast, et s'il moy licence d'entrer en son meason et il moy discharge, ore maintenant jeo fue arcte et compel de aler hors de son meason, s'il ne soit en temps de tempest," Y.B. 20 Ed. IV. Trin. pl. 2.

[2] "Sicome le pleintif licence le defendant de pasture son terre ove son avers, ore defendant avera accion envers quecunque que vient sur le terre durant le terme," ibid.

[3] Palmer 71; S.C. 2 Rolle, Rep. 152; Popham 151; Noy 98; Golbolt 282.

[4] Palmer at p. 73 *per* Mountague, C.J.; cp. Warr and Co. v. London County Council [1904] 1 K.B. at pp. 722-723 *per* Romer, L.J.

[5] Palmer at p. 74 *per* Haughton, J.

[6] "Chescun licence, que est in son nature licence, est countermandable; et est ou de pleasure ou profit, et quant est de pleasure tantum, la est counter-mandable a pleasure; et si soit de profit uncertain, la est aussi countermandable; mes si soit de profit certain, la est un interest, et nient countermandable," ibid at pp. 73-74.

[7] (1674) Vaughan at p. 351.

use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer killed, and tree cut down, they are grants."

These cases, and others which followed them, were elaborately reviewed in the judgments of the court in *Wood v. Leadbitter* in 1845;[1] and the conclusion was reached that all licences were revocable, but that if they were coupled with a grant they were irrevocable. But it is obvious, firstly, that when the court talked of a grant, they meant the grant of some ascertainable property, which is capable of being granted;[2] and, secondly, the court itself decided in that case that such a grant must have been validly made, so that if (as in that case) the grant was of an incorporeal right over land which could not be granted without a deed, and no deed was executed, the licence was revocable.

There can be no doubt that the judgment in this case is a masterly historical analysis of the evolution of the law as to the nature of a licence. But in one point the application of the common law rule was modified by equity. Equity would, in certain cases, give effect to a grant made for value though not under seal.[3] This is, of course, a perfectly intelligible modification; and is similar in character to the manner in which equity modified the law, by enforcing verbal contracts to purchase interests in land, in cases in which there had been part performance.[4] Unfortunately a desire to do substantial justice has recently led the court of Appeal to disregard the rule that a grant must be the grant of some ascertainable property, and, in consequence, both to make a wholly new extension of the equitable modification of the legal rule, and to cast unfortunate and undeserved doubts upon the principles laid down in *Wood v. Leadbitter*.[5]

The rule, therefore, that an easement is a right appurtenant to land distinguishes it both from a licence and a customary right in the nature of an easement. But this characteristic does not distinguish it from a natural right, which belongs to every owner of property as such. We have seen that Bracton had grasped this distinction—though he somewhat confuses it by calling these natural rights servitudes imposed by law;[6] and that, in later cases, it was preserved in the distinction between things of com-

[1] 13 M. and W. 838.

[2] This is clear from the words of Dodderidge, J., in Webb v. Paternoster cited above 327 n. 6; and the same principle was laid down in the case of Warr v. London County Council [1904] 1 K.B. at pp. 721-723 *per* Romer, L.J.

[3] Duke of Devonshire v. Eglin (1851) 14 Beav. 530; Frogley v. Earl of Lovelace (1859) John. 333.

[4] Vol. vi 393, 659.

[5] Hurst v. Picture Theatres Ltd. [1915] 1 K.B. 1; and see an article on this case by Sir J. Miles, L.Q.R. xxxi 217.

[6] Vol. iii 155 n. 2.

mon right which need not be prescribed for, and things against common right which must be founded on prescription or grant.[1] But, in the centuries which succeeded, the distinction tended to be overlooked. We have seen that the same remedy—the assize of nuisance—was used to remedy both the infringement of natural rights, and of easements;[2] and the same remark applies to the action on the case which succeeded the assize. Both the Year Books,[3] and cases of the sixteenth and seventeenth centuries, illustrate the confusion thus caused between the two sets of rights. Thus, in *Aldred's Case*,[4] rules are laid down as to the conditions under which an action for nuisance lies for the infringement both of natural rights and of easements, without any very explicit distinction between the two sets of rights; and the same remark applies to Blackstone's treatment of this subject.[5] It is true that it was clearly laid down, both in *Aldred's Case*[6] and in *Bowry and Pope's Case*,[7] that to found an action for the infringement of the right to light a grant or prescription must be shown; and, in other cases, the same thing is expressed by the rule that the house, in respect of which the light is claimed, must be an ancient house.[8] This indicates a sense of the difference between natural rights or things of common right, and easements or things contrary to common right. But it was not till the case of *Sury v. Pigot* in 1625[9] that the difference was stated in anything like its modern form. In that case an action was brought for obstructing a stream of water which ran over the defendant's land to a pool in the plaintiff's land. The defendant pleaded that both the plaintiff's land and the defendant's land had once belonged to Henry VIII., and that therefore the right to the flow of the water had been extinguished by unity of seisin. Whitelocke, J., after citing Bracton's words as to prædial servitudes, and pointing out that they began by grant or prescription, said,[10] "A way or a common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also, but in our case the water course doth not begin by the consent of parties, nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity"; and Crew, C.J., said, "our case it is

[1] Vol. iii 155. [2] Ibid 156. [3] Ibid 156.
[4] (1611) 9 Co. Rep. 57b. [5] Comm. iii 216-217.
[6] 9 Co. Rep. at f. 58a. [7] (1584) 1 Leo. 168.
[8] "It was agreed that formerly the way was to declare of ancient lights and ancient messuage, but now that was altered," *per* Holt, C.J., Rosewell v. Prior (1704) 6 Mod. 116 S.C. 2 Salk. 459, 460; following the decision of Hale, C.J., in Cox v. Mathews (1673) 1 Ventris 239, it was held that it was not necessary to say in the declaration that the lights were ancient, because the claim might be otherwise supported, e.g. by implied reservation, 6 Mod. 116; below 339; and that, if prescription was relied on, the word "consuevit" would do, 2 Salk. 459; for an illustration of the older method of declaration see Hughes v. Keene (1612) Yelv. 215.
[9] Popham 166. [10] At p. 170.

not like to cases of common, or a way, because the water course is a thing natural, and therefore by unity it shall not be discharged."[1]

But even in *Sury v. Pigot* the distinction was not very firmly grasped. Whitelocke, in the earlier part of his judgment, again introduces the confusing parallel of light, for which a prescription is necessary;[2] and Dodderidge, J., compares the natural right to a thing of common right like common appendant, or to such an easement as a way of necessity, pointing out that all these rights, though extinguished by unity of possession, would revive on a future severance of the tenements.[3] Indeed, I think that it would be true to say that the distinction did not clearly emerge till the nineteenth century. The reason for this is to be sought in another consequence of the rules affecting the remedy by way of assize of nuisance.

The assize lay only for the person who was in possession of the freehold at the time of the nuisance committed.[4] From this the consequence was deduced that, if the owner of the freehold to which the nuisance was done conveyed it to another, that other, not being the freeholder at the time of the nuisance committed, had no cause of action;[5] and, in the opinion of some judges, this rule was applicable, both when the owner of the property sued by action on the case, and when he sued by the assize.[6] It is true that Fitzherbert considered that, even if both the land suffering and the land occasioning the nuisance were aliened, a writ modelled on a *quod permittat*, by virtue of the statute Westminster II. in consimili casu, could be had;[7] and that it was held in a case of Elizabeth's reign that, in an action on the case, it was not material when the nuisance was caused.[8] But there was a good deal of

[1] At p. 172. [2] At p. 170.

[3] He said that there were two reasons why unity of possession did not extinguish the water course, "1. For the necessity, and this is the reason that common appendant by the unity of possession shall not be extinguished, for it is appendant to ancient landhide, and gain arable land, which is necessary for the preservation of the commonwealth; and as in this case there is a necessity of bread, so in our case there is a necessity of water: and for the case of a way *distinguendum est*, for if it be a way which is only for easement it is extinguished by unity of possession, but if it be a way of necessity, as a way to market or church, then it is not extinguished by unity of possession," ibid at p. 172; we see a similar confusion in the arguments used in Tenant v. Goldwin (1705) 1 Salk. 360. [4] Vol. iii 11, 156-157.

[5] Leeds v. Shakerley (1600) Cro. Eliza. 751; cp. Moore v. Browne (1573) Dyer 319b.

[6] Beswick v. Cunden (1595) Cro. Eliza. at p. 403 *per* Clinch and Fenner, J.J., though they afterwards changed their opinion; on the other hand, in a later case between the same parties, ibid 520, the court gave judgment for the defendant on the ground, firstly, that case did not lie when the plaintiff could bring assize or quod permittat, and, secondly, that it was no offence merely to keep the place as he found it.

[7] F.N.B. 124 H.; for the writ quod permittat see vol. iii 20.

[8] Westbourne v. Mordant (1591) Cro. Eliza. 191—"the declaration is good; for an action of the case declareth the whole matter, so that it is not material when the nuisance was erected, for he that is hurt by it shall have an action," *per* Gawdy, J.

authority in favour of the old view; and we can see a trace of it as late as 1702.[1] However, by the end of the sixteenth century, the two divergent views were more or less reconciled by the ruling that if the nuisance had been caused during the tenure of a freeholder, his alienee could sue for its continuance.[2] But there can be little doubt that this procedural rule is the origin of the substantive rule laid down by Blackstone, that a person who comes to an established nuisance has no cause of action.[3] But this really amounted to saying that a man could acquire an easement to disturb another's natural rights by mere usage, however short, provided that the plaintiff was not in a position to complain when the nuisance was set up.[4] Obviously this introduced a confusion between the limits of natural rights and easements, which was not got rid of till this doctrine was swept away by decisions of the nineteenth century.[5]

This differentiation between easements on the one hand, and customary rights in the nature of easements, licences, and natural rights on the other, was a condition precedent to the settlement of the modern law. We shall now see that, at the same time as this differentiation was being worked out, the settlement of certain of these principles was proceeding.

(ii) The settlement of some of the principles of the modern law.

Because an easement is appurtenant to land, the extent of the rights conferred by it are limited in the same way as other incorporeal rights appurtenant or appendant are limited.[6] Thus a right of way appurtenant to a house can only be used for purposes connected with the house. The older authorities had laid it down that, if a way was appurtenant to a house, it could only be used by the owner for the time being of the house.[7] It followed, therefore, that it could only be used to go to and from that house, and not for the purpose of going to and from a more distant

[1] "If this action here were brought by an alienee of the land, to which the nuisance was, against the erector, and erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee," *per curiam*, Rosewell v. Prior 12 Mod. at p. 640; probably this doubt was not well founded, see Gale, Easements (7th ed.) 424—but it testifies to the continuance of the older ideas.

[2] This was the view of Gawdy, J., in Beswick v. Cunden (1595) Cro. Eliza. at p. 402, which was an action on the case; and effect had been given to this view in Rolf's Case in 1583 cited 5 Co. Rep. at f. 101a; and it was applied to a quod permittat in Penruddock's Case (1599) 5 Co. Rep. 100b.

[3] "If my neighbour makes a tan yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue," Comm. ii 402-403.

[4] Gale, Easements (7th ed.) 417.

[5] Elliotson v. Feetham (1835) 2 Bing N.C. 134; Bliss v. Hall (1838) 4 Bing N.C. 183; St. Helens Smelting Co. v. Tipping (1865) 11 H.L.C. 642.

[6] Above 320-321.

[7] Y.B. 5 Hy. VII. Mich. pl. 15 *per* Fairfax, J.

point.[1] Partly for this reason, partly by making use of the analogy of profits a prendre, and partly because any other construction would facilitate what the law now refuses to allow[2]—the creation of a novel mode of enjoying property—it was held in *Ackroyd v. Smith* in 1850[3] that the extent of the rights conferred by an easement must be limited to purposes connected with the dominant tenement. On the other hand, it was held, as early as 1601, that an alteration of the dominant tenement, which in no way increases the burden on the servient tenement, will not destroy the easement.[4]

It was a rule of the Roman law, which was perhaps recognized by Bracton, that "the causes of easements must be perpetual"; that is, that the rights attached to the dominant tenement, and exercised over the servient tenement, "should be in their nature permanent, and such as are capable of continuing in their present condition for an indefinite period."[5] A somewhat similar idea was expressed in the rule that "a man cannot prescribe in a profit appendant to a thing, unless the principal thing may have and hath a perpetual continuance and duration."[6] This rule was applied both to customary rights claimed by copyholders[7] and to easements, by cases of the sixteenth and seventeenth centuries.[8] But this rule was of a more limited application than the Roman rule. It referred rather to the permanence of the dominant tenement than to the permanence of the right attached to it. Cases of the nineteenth century, chiefly connected with rights to water, have, in effect, applied the Roman rule; and have laid it down that the exercise of rights of a merely temporary character cannot constitute an easement, which will entitle the owner of a neighbouring property, who is benefited by the exercise of these rights, to insist on their continuance.[9]

It is clear that, from an early period, the courts have settled as a matter of law what are the natural rights of the owners of property.[10] Thus, in 1611, in *Aldred's Case*, it was settled that no action of nuisance would lie for stopping up a view;[11] and later it

[1] 1 Rolle Ab. 391, citing cases of 1619 and 1634; Lawton v. Ward (1697) 1 Ld. Raym. 75.

[2] Below 333.

[3] 10 C.B. 164, at pp. 187-188.

[4] Luttrel's Case 4 Co. Rep. at f. 87a-88a.

[5] Gale, Easements (7th ed.) 15-17; the passage from Bracton which seems to recognize this principle is as follows: "Item si quis prohibeatur aqua uti, item haurire, sive pecus ad aquam appellere, cadit similiter in assisam, sed hoc non est de cisterna, quia cisterna non habet aquam perpetuam, nec aquam vivam, quia cisterna imbribus concipitur," f. 233a.

[6] Withers v. Iseham (1553) Dyer at f. 70b; cp. Holbach v. Warner (1624) Cro. Jac. 665; Baker v. Brereman (1634) Cro. Car. at p. 419.

[7] Above 321.

[8] Authorities cited in n. 6 above.

[9] Gale, Easements (7th ed.) 17.

[10] Vol. iii 155-156.

[11] 9 Co. Rep. at f. 58b; followed by Lord Hardwicke in Attorney-General v. Doughty (1752) 2 Ves. Sen. 453, overruling a hasty decision of Lord Jeffreys.

was held that no action would lie for a disturbance of privacy by opening a window.[1] On the same principle the law has always assumed the right to determine the extent of the right conferred by an easement. But would the law go further, and define the number of possible easements which a landowner could create over his property? We have seen that in the Middle Ages no limitation of this kind was known;[2] and down to the decision of *Keppel v. Bailey* in 1833,[3] no attempts in this direction seem to have been made. In that case Lord Brougham laid it down that "incidents of a novel kind cannot be devised, and attached to property, at the fancy and caprice of the owner";[4] because, if that were permitted, owners could impress on the holding of land "a peculiar character which would follow the land into all hands however remote."[5] It is clear that the reason for this rule is to be found in the fact that an easement was appurtenant to land,[6] and that it was coming to be recognized that it gave rise to a permanent right.[7] It should also be remembered that it was just about the same time that the modern rule against perpetuities was finally fixed;[8] and it is clear that a power to fix permanently a peculiar character on the holding of land, at the caprice of the owner, might be detrimental to the freedom of alienation.[9] To some extent the freedom thus denied to landowners has been restored by the application of the principle that a grantor must not derogate from his grant,[10] and by the growth of the equitable doctrines as to restrictive covenants.[11] Moreover it should be observed that Lord Brougham only denies that new easements may be created "at the fancy and caprice of the owner." Lord St. Leonards said that "the category of easements must alter and expand with the changes that take place in the circumstances of mankind."[12] This may leave some opportunity for expansion if a new easement should be created, not from fancy or caprice, but to meet some new need.[13]

[1] Chandler v. Thomson (1811) 3 Camp. 80.
[2] Vol. ii 262, 580; vol. iii 154.
[3] 3 My. and K. 517.
[4] Ibid at p. 535.
[5] Ibid at p. 536.
[6] "Every close, every messuage might be held in a separate fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed," ibid.
[7] This was the basis of the distinction drawn in that case between the rules as to covenants running with the land as between vendor and purchaser of an estate in fee simple, and as between landlord and tenant, ibid at pp. 536-537; vol. iii 164-165; above 287.
[8] Above 227.
[9] This point was made in the argument, 2 My. and K. at p. 525.
[10] See Browne v. Flower [1911] 1 Ch. at pp. 225-226 *per* Parker, J.
[11] Tulk v. Moxhay (1848) 2 Ph. 774; Haywood v. Brunswick Building Society (1881) 8 Q.B.D. 403; cp. above 146-147.
[12] Dyer v. Hey (1852) 1 Macq. 305.
[13] See Attorney-General of Southern Nigeria v. John Holt and Co. [1915] A.C. at p. 617, where Lord St. Leonard's dictum is cited with approval.

The common law follows the Roman law[1] in making the duty of the servient owner a merely passive duty, and placing upon the dominant owner the duty of doing anything necessary to make his right effectual.[2] But it probably attained this result by a route somewhat different from that followed by Roman law. The English rule was probably the result of the character of the remedies —the assize of nuisance or abatement[3]—by which the dominant owner enforced his rights. It was only if the servient owner did anything to impede the right that the assize lay; and in that case the dominant owner could either bring the assize or abate the nuisance. From the fact that the remedy only lay for a positive act of misfeasance on the part of the servient owner, it followed that he could not be made liable merely for a non-feasance, therefore it is for the dominant owner to do what is necessary to make his right effective. Thus a conclusion similar to that reached by the Roman law, and similar to that stated by Bracton,[4] was reached. This conclusion was drawn in 1469;[5] and in 1669 it was clearly laid down that, as the dominant owner had this right, the servient owner was under no duty to do anything to maintain the right.[6] On the other hand, it was laid down in the nineteenth century that, if the dominant owner so used his rights as to cause a nuisance to the servient owner, he was liable.[7]

It was well settled in the sixteenth century that easements, like other incorporeal things, if created expressly, must be created by deed.[8] It was also settled that they could be created by implication. This implication will arise if an intention is shown, by the words used in the conveyance of the property, to revive an easement which had formerly been annexed to the property, but which had since been extinguished by unity of seisin;[9] or if the easement so arising is a right which is both continuous and

[1] Gale, op. cit. 8, 450.

[2] "When I grant a way over my land, I shall not be bound to repair it, but if I voluntarily stop it, an action lies against me for the misfeasance; but for the bare non-feasance . . . no action at all lies," Pomfret v. Ricroft (1669) 1 Wms. Saunders at p. 322 *per* Twysden, J.

[3] As to the remedy by abatement see Bracton f. 233a; vol. iii 279; Y.B. 9 Ed. IV. Mich. pl. 10 p. 35; Baten's Case (1611) 9 Co. Rep. at f. 55a; R. v. Rosewell (1699) 1 Salk. 459.

[4] "Ad aquae ductum pertinet purgatio, sicut ad viam pertinet refectio," f. 221b.

[5] Y.B. 9 Ed. IV. Mich. pl. 10 p. 35, where the court denied Choke's statement that a man, having an easement of water, must prescribe for the right to repair or clean it; see the passage cited Gale, op. cit. 461; and see Jones v. Pritchard [1908] 1 Ch. at p. 638 for a restatement of this principle.

[6] Pomfret v. Ricroft (1669) 1 Wms. Saunders at p. 322; cp. Taylor v. Whitehead (1781) 2 Dougl. 745.

[7] Humphries v. Cousins (1877) 2 C.P.D. 239; cp. Jones v. Pritchard [1908] 1 Ch. at pp. 638-639; for the parallel Roman rule see Gale, op. cit. 479, 480.

[8] Co. Litt. 9a.

[9] Bradshaw v. Eyre (1597) Cro. Eliza. 570; Worledg v. Kingswel (1601) ibid 794; see above 258-259.

apparent, e.g. if a man sold a house with a gutter running on to land retained by the vendor, or conveyed by the vendor to another;[1] or, as we shall see, in case of ways of necessity.[2] But, up to the end of the seventeenth century, there was considerable doubt as to the principle upon which these implied grants were permitted. In some of the cases they were treated as if they were natural rights, or as analogous to ways of necessity.[3] It followed from this theory that, on a severance of two tenements, a continuous and apparent easement might arise, either by implied grant, or by implied reservation.[4] But though this view was held by Gale,[5] it is now established, in accordance with the views of Kelynge, J.,[6] and Holt, C.J., that the creation of such easements is based on the principle that a man shall not derogate from his grant. "If," said Holt, C.J.,[7] "the builder of the house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house. . . . But if he had sold the vacant piece of ground and kept the house, without reserving the benefit of the lights, the vendee might build against his house. But, in the other case, when he sells the house, the vacant piece of ground is by that grant charged with the lights."

That an easement was extinguished by unity of seisin, because no man can have a servitude over his own property, was stated by Bracton,[8] and accepted by Littleton[9] and Coke. But it was pointed out by Coke that this extinguishment would only occur if the two properties were held for equally "high and perdurable" estates.[10] Otherwise the unity of possession will only cause a

[1] Y.B. 11 Hy. VII. Trin. pl. 6 *per* Townshend; Nicholas v. Chamberlain (1607) Cro. Jac. 121.

[2] Below 337-338.

[3] See Sury v. Pigot (1627) Popham 166; above 330.

[4] Palmer v. Fletcher (1663) 1 Lev. 122; Twysden, J., said, "Whether the land be sold first or afterward, the vendee of the land cannot stop the lights of the house in the hands of the vendor or his assignees," and to this apparently Wyndham, J., assented; but Kelynge, J., held that if "the land had been sold first, and the house after, the vendee of the land might stop the lights"; and the court seems to have held this view in Nicholas v. Chamberlain (1607) Cro. Jac. 121.

[5] Op. cit. 137-138; he considered that these cases did not depend upon the principle that a man shall not derogate from his grant, but upon a title similar to that designated in the French code as "destination du pere de famille," i.e. an arrangement which the owner of several heritages has made for their respective user, ibid 96-97; but this view was condemned by Lord Westbury in Suffield v. Brown (1864) 4 De G. J. and S. at pp. 193-195.

[6] Above n. 4.

[7] Tenant v. Goldwin (1705) 2 Ld. Raym. at p. 1093; the modern law is laid down in Suffield v. Brown (1864) 4 De G. J. and S. 185; Wheeldon v. Burrows (1879) 12 C.D. at p. 51, where Holt's decision is expressly approved and accepted as the starting point of the modern law.

[8] Vol. iii 157, n. 3.

[9] § 561—a case where the lord extinguishes his seignory by granting it to the tenant.

[10] Co. Litt. 313a, 313b.

suspension.[1] These principles were applied by Coke to profits, rents, and seignories; but it is clear from a case of 1606 that they apply equally to easements.[2] As we have seen,[3] on severance, a new easement may arise by implication; but, as Brooke pointed out, it is not the old, but a new easement;[4] and this has been the view which has prevailed.[5] It would seem to follow from *Luttrel's Case*,[6] that any permanent alteration of the dominant tenement, which would make the continuance of the easement impossible, or would permanently alter the burden on the servient tenement, would destroy the easement.[7] The question how far mere non-user will destroy an easement was long a very uncertain question. Coke seems to have thought that it was only non-user for as long a period as would suffice to establish a prescriptive right which would have any effect;[8] and his view was approved by Littledale, J., in respect to discontinuous easements like a right of way, though not in respect to continuous easements like the right to light.[9] But the modern cases seem to show that in all cases the question depends upon whether, from the non-user, the existence of an intention to abandon can be deduced.[10]

These are a few illustrations of the manner in which some of the principles of the modern law of easements have been reached. In conclusion we must glance at the manner in which these and other principles have been applied to elucidate the nature of certain kinds of easements.

(2) *Particular easements.*

Under this head I shall deal very shortly with one or two rules relating to ways, water, light, air, and support.

(i) *Ways.*—Bracton[11] repeats the Roman division of ways into iter, via, and actus, and gives them the Roman meanings; and Coke amplifies and repeats Bracton's statements.[12] But this classification has never been really received as a part of English

[1] Co. Litt. 313a.
[2] Heigate v. Williams Noy 119.
[3] Above 334.
[4] Brooke, Ab. *Extinguishment* pl. 15 = Y.B. 21 Ed. IV. Hil. pl. 5.
[5] Holmes v. Goring (1824) 2 Bing. at p. 83; but not without some conflict of opinion, below 337 and n. 7.
[6] (1601) 4 Co. Rep. 86a; cp. (1627) Palmer at p. 446 *per* Dodderidge, J.
[7] "And so it was said in all the cases of estovers and tenures aforesaid, *when the alteration of the quality or name of part of the house doth not cause any prejudice to the terre tenant*, the estovers and services remain," 4 Co. Rep. at ff. 87b, 88a.
[8] "It is to be known that, the title being once gained by prescription or custom, cannot be lost by interruption of the possession for 10 or 20 years, but by interruption in the right: as if a man had a rent or common by prescription, unity of possession of as high and perdurable estate is an interruption in the right," Co. Litt. 114b.
[9] Moore v. Rawson (1824) 3 B. and C. at pp. 339-341.
[10] Crossley v. Lighttowler (1867) 2 Ch. App. at p. 482.
[11] At ff. 232a, 232b.
[12] Co. Litt. 56a.

law. In this, as in other cases, English law has declined to draw unnecessary distinctions of this kind. It has preferred to lay down a general rule, and, within the limits of that rule, to leave the parties concerned to make their own definitions.[1] It has therefore gone on the principle of treating the extent of any given right of way as a question to be determined by the facts and circumstances of each individual case;[2] and, as in other cases of rights appurtenant to a dominant tenement, the character of that tenement, and the character of the road itself, are the most important circumstances to be taken into account in considering the extent of the easement.[3]

One particular class of way—the way of necessity—is remarkable for the divergent views which have been from time to time expressed as to the principles on which it is based. The typical case of a way of necessity is the case where A sells to B a plot of land surrounded on all sides by his (A's) land; or, conversely, where A sells B land and reserves to himself a plot surrounded by the land which he has sold to B. In either case there is a way of necessity from the land-locked plot over the intervening plots.[4] Some of the older cases seem to have regarded these ways as being in the position, either of rights appendant, i.e. of common right,[5] or of natural rights.[6] From this analogy the conclusion was deduced that they were not destroyed by unity of seisin, but continued to exist in a dormant state, and could revive if the two tenements were subsequently separated.[7] But the better opinion would seem to be that they are true easements which, on grounds of public policy,[8] arise by implication of law;

[1] A good illustration of this tendency is the manner in which the extent of an easement is tested by the general consideration whether or not any given interference with it amounts to a nuisance, vol. iii 155-156; below 341.

[2] Cowling v. Higginson (1838) 4 M. and W. at p. 256 *per* Parke, B.; cp. Gale, op. cit. 323.

[3] "Prima facie the grant of a right of way is the grant of a right of way having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used; and both those circumstances may be legitimately called in aid in determining whether it is a general right of way, or a right of way restricted to foot passengers, or restricted to foot passengers and horsemen or cattle, which is generally called a drift way, or a general right of way for carts, horses, carriages, and everything else," *per* Jessel, M.R., Cannon v. Villars (1878) 8 C.D. at p. 421.

[4] 2 Rolle, Ab. *Grants* 60 pl. 17; cp. 1 Wms. Saunders 323 n. (6).

[5] Y.B. 11 Hy. IV. Mich. pl. 12—where apparently Huls thought that any way which was a necessary appendage would revive if, after the two tenements had been united, they were subsequently separated; the case is cited Gale, op. cit. 125; cp. Beaudely v. Brook (1608) Cro. Jac. at p. 190, where it was said by the court that "when land is granted with a way thereto it is *quasi* appendant to it, and a thing of necessity."

[6] Sury v. Pigot (1627) Popham at p. 172.

[7] Clark v. Cogge (1608) Cro. Jac. 170 where it was resolved that "the way remained"; but, as we have seen, above 336, this view was never universally held, and is now decided to be incorrect.

[8] Packer v. Wellstead (1658) 2 Sid. at p. 112.

and that they are analogous to cases where the law annexes a secondary right, because, without this secondary right, the principal right could not be enjoyed.[1] On this view both their duration [2] and extent [3] are limited by the duration and the extent of the necessity.

(ii) *Water.*—When Gale wrote his book on easements in 1839 he stated that "watercourses are the only class of easements with regard to which the law has been settled with any degree of precision."[4] That this was so was due no doubt, firstly, to the importance of water rights to an agricultural community; and, secondly, to the importance of this right as the motive power for mills. It was for the latter reason that this branch of the law had been developed at the end of the eighteenth and the beginning of the nineteenth centuries; and that the law was acquiring some rules, not only as to the right to an unimpeded flow of water, the right to divert water, and the right to discharge water on to a neighbour's land; but also as to the right to foul water,[5] and as to the right of a servient owner to compel the dominant owner to continue to discharge water on to his land.[6]

Bracton laid down the two main principles from which the law has started. (*a*) the right of riparian owners to an uninterrupted flow of water is a natural right.[7] This rule was, as we have seen, restated in the case of *Sury v. Pigot* in 1625;[8] and in the case of *Cox v. Mathews* in 1673 it was acceded to by Hale, C.J.[9]—"if," he said, "man hath a water course running through his ground, and erects a mill upon it, he may bring his action for diverting the stream, and not say antiquum molendinum." (*b*) The right to divert the stream, for the purpose of driving a mill or otherwise, could be acquired as an easement by grant or prescription.[10] Such a right was recognized in *Luttrel's Case*,[11] and by Hale, C.J., in *Cox v Mathews*.[12] Moreover, it would appear that an easement to discharge water from a roof on to another's land, was probably

[1] Gale, op. cit. 152; 1 Wms. Saunders 323 n. (6).
[2] Holmes v. Goring (1824) 2 Bing. 76.
[3] Corporation of London v. Riggs (1880) 13 C.D. 798.
[4] Preface to the first edition.
[5] Wright v. Williams (1836) 1 M. and W. 77.
[6] Arkwright v. Gell (1839) 5 M. and W. 203.
[7] "Item a jure imponitur servitus . . . ne faciat fossam in suo, per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte," f. 221a.
[8] Above 329-330.
[9] 1 Ventris 237; cp. Glynne v. Nichols (1658) Comb. 43; Mason v. Hill (1832) 3 B. and Ad. 304, 5 B. and Ad. 1.
[10] "Item si servitus imponatur fundo alicujus a jure . . . per quam prohibetur ne quis faciat in suo per quod nocere possit vicino, ut si stagnam exaltaverit in suo vel de novo fecerit, per quod noceat vicino . . . hoc erit ad nocumentum liberi tenementi vicini injuriosum, nisi hoc a vicino permissum sit quod liceat," f. 232a.
[11] (1601) 4 Co. Rep. at f. 87a.
[12] (1673) 1 Ventris 237; see Mason v. Hill (1832) 3 B. and Ad. 304, 5 B. and Ad. 1.

recognized both in the Middle Ages and in the seventeenth century.[1] It was not till the middle of the nineteenth century that, with the help of Roman law, the modern rules as to rights in respect of water percolating through the ground in undefined channels, were finally settled.[2]

(iii) *Light.*—Down to the middle of the nineteenth century there was comparatively little authority upon this easement.[3] But, certainly as early as the end of the sixteenth century, it was recognized that a prescriptive right could be acquired, which would prevent the owner of land, over which light came, from blocking the windows of an adjoining house so as to cause a nuisance.[4] It was also recognized, at the same period, that this was not a natural right; so that, unless the house had acquired the right by prescription or grant, the deprivation of the light gave rise to no cause of action.[5] It is not surprising that the paucity of authority on this subject should have given rise to conflicting views as to the nature and extent of this easement. If the right is granted by deed the rights of the parties will be defined by the deed. But, in the larger number of cases which have come before the courts, the right is claimed by prescription; and then the question of the extent of the right so acquired naturally arises. On this matter two conflicting theories were developed.[6] Looking at the easement from the point of view of the right of the dominant owner, and having regard to the analogy to other easements appurtenant to land,[7] it was not difficult to come to the conclusion that the extent of the right was measured by the light actually used by the dominant tenement; so that the tenant could claim the whole of the light which it had enjoyed for the prescriptive period. It followed that any diminution of the light might be an actionable wrong, even though the room was ordinarily well lighted, if in fact an extraordinary amount of light had formerly been enjoyed during the prescriptive period.[8] But this analogy

[1] Y.B. 18 Ed. III. Trin. pl. 1; cp. Gale, op. cit. 251-252.

[2] Acton v. Blundell (1843) 12 M. and W. 324; Chasemore v. Richards (1859) 7 H.L.C. 349.

[3] "There are scarcely any authorities bearing on the question until 1865," *per* Wright, J., Warren v. Brown [1900] 2 Q.B. at p. 727.

[4] Aldred's Case (1611) 9 Co. Rep. at f. 58a, citing the case of Bland v. Mosely of 1587.

[5] Bowry and Pope's Case (1589) 1 Leo. 168: "the window, in the stopping of which the wrong is assigned, appears upon the plaintiff's own showing to be of late erected, scil. in the time of Queen Mary, the stopping of which by any act upon my own land, was holden lawful and justifiable by the whole court. But if it were an antient window time out of memory, etc., then the light or benefit of it ought not to be impaired by any act whatsoever"; cp. Palmer v. Fleshes (1663) 1 Sid. 167.

[6] See Colls v. Home and Colonial Stores [1904] A.C. at p. 189 *per* Lord Macnaghten.

[7] Above 321-322, 331-332.

[8] Calcraft v. Thompson (1867) 15 W.R. 387; Warren v. Brown [1902] 1 K.B. 15.

to other easements was not a very complete analogy. The extent of the user of a way, for instance, or a watercourse, might well be measured by the needs of the dominant tenement; and a prescriptive right of these dimensions might well be acquired to the way or watercourse, because the extent of the user was open and obvious. But, in the case of light, the extent of the user was by no means so obvious. All that was obvious was the fact that a person had a right to the access of light through a defined window or windows. Behind those windows there might be a small or a large room, so that a smaller or a larger amount of light might be acquired; or the room might be used for ordinary purposes requiring only an ordinary amount of light, or for extraordinary purposes requiring an extraordinary amount. But all this might well be unknown to the owner of the servient property. The dominant owner's manner of user of the light was necessarily "clam" as regards the owner of the servient property. It followed, therefore, that to allow the dominant owner the right to acquire by prescription all the rights which he had actually used, might be to sanction the acquisition of a prescriptive right without the knowledge or means of knowledge of the servient owner.[1] But this, as we shall see, is contrary to the rules governing prescription.[2] It is true that the section of the Prescription Act which deals with rights to light might have been interpreted as giving effect to this view.[3] But it was not so interpreted;[4] and the obvious hindrance to building operations, and the unfounded claims to compensation to which this view tended to give rise,[5] induced the House of Lords in 1904 to adopt the other view of the nature of this easement. Reverting to the rules which sprang from the nature of the remedy for an infringement of the right to light in common with other easements, they followed the line of cases in which it had been laid down that no one could complain of an infringement of this right, unless he could prove that this infringement amounted to a nuisance.[6] It followed that, whatever was the amount of the light previously enjoyed, there was no cause of action unless so much light was taken that the house was rendered uncomfortable.

As we have seen, the action on the case for a nuisance, or the assize of nuisance, was the remedy for the infringement of many of these prescriptive incorporeal rights.[7] The question whether

[1] See Lanfranchi v. Mackenzie (1867) L.R. 4 Eq. at pp. 428-429 *per* Malins, V.C.
[2] Below 343.
[3] 2, 3 William IV. c. 71 § 3; cp. Colls v. Home and Colonial Stores [1904] A.C. at p. 198 *per* Lord Davey.
[4] Kelk v. Pearson (1871) L.R. 6 Ch. App. 809.
[5] Colls v. Home and Colonial Stores [1904] A.C. at p. 193 *per* Lord Macnaghten.
[6] Ibid at pp. 186-188.
[7] Vol. iii 155-156; above 21-22.

or not they had been infringed was ascertained by asking whether or not the act complained of amounted to a nuisance. This was the general test of the extent of the prescriptive right. But, in the case of most of these appurtenant rights, the obvious needs of the dominant tenement, and its manner of user, afforded an objective test of the extent of the right, which obscured the fact that an infringement was in fact a nuisance. No such objective test being possible in the case of the prescriptive right to light, because neither the needs of the dominant tenement nor its manner of user were obvious, it became necessary to emphasize the fact that the only test of infringement was the test whether or not the infringement amounted to a nuisance. It seems to have been thought strange by Lord Lindley that the right to light "is no more than a right to be protected against a particular form of nuisance."[1] But, historically, all easements were rights of that kind; for the question whether or not they were infringed, in other words the question of their extent, depended upon the question whether the person entitled to the right could complain of a nuisance.[2] It is true, as we have seen, that this aspect of the right was not so well marked in some of them; but, for all that, it was the procedural basis of the protection given to them by the law. It is because this procedural basis had been lost sight of, and because actions for the disturbance of easements had come, as Lord Macnaghten has said, to be regarded as actions to prevent the infringement of a right rather than as actions to redress a wrong,[3] that this characteristic is sometimes regarded as an anomaly peculiar to the easement of light.

(iv) *Air.*—In *Aldred's Case* air and light were put upon the same basis—"for the stopping as well of the wholesome air as of light an action lies."[4] But it is by no means clear whether the cause of action referred to was polluting the air, which is actionable as infringing the natural rights of an owner of property, or whether it was stopping the access of air. It is probable, however, that at that time both were considered to give a cause of action; for there is some authority for saying that the building of a house so near to a mill that the mill was stopped was an actionable nuisance.[5] It would appear, therefore, that both

[1] "In this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement," Colls v. Home and Colonial Stores [1904] A.C. at p. 208.

[2] Vol. iii 155-156; above 329.

[3] Colls v. Home and Colonial Stores [1904] A.C. at p. 186.

[4] (1611) 9 Co. Rep. at f. 58a.

[5] Goodman and Gore's Case (1613) Godbolt 189—where the plaintiff was nonsuited for a defect of pleading; Trahern's Case (1614) ibid 121—where the plaintiff got judgment; Winch 3; it may be that all these reports are of the same case, see Gale, op. cit. 298 n. (*d*).

interference with the free current of air and the pollution of air, were regarded as infringing the natural rights of the owners of property. But this view has not been followed. Though pollution[1] or deprivation of the air[2] is regarded as the infringement of a natural right, interference with the free current of air is not.[3] Therefore a plaintiff who complains of an interference with the free current of air must prove by prescription[4] or by a grant express or implied, that he is entitled to an easement; and this easement can only be a free current of air through a defined aperture.[5] In such a case the easement to the access of air may arise; and similarly the right to pollute the air may be acquired as an easement.[6]

(v) *Support.*—It seems to have been settled in the case of *Wilde v. Minsterley*, in 1640, that the right of support for land in its natural state was a natural right; but that the right of support for buildings was not;[7] and the latter conclusion was followed in 1663.[8] Otherwise the law seems to be singularly bare of authority till the decisions of the nineteenth century. These decisions make it clear that an easement, in derogation of the natural right of support for land, can be acquired by grant express or implied, and probably by prescription.[9] The whole question of the easement of support for buildings was elaborately reviewed by the judges and the House of Lords in 1881 in the case of *Dalton v. Angus*,[10] which establishes the rule that the easement of support for buildings can be acquired by a user of twenty years.

This short sketch shows that, up to the beginning of the nineteenth century, the law as to particular easements was but meagre. But, as we have seen, the law had already acquired a certain number of principles applicable to easements in general. These principles, with the assistance of the rules of Roman law, enabled the courts in the nineteenth century to build up on these slender foundations the elaborate superstructure of the modern law as to particular easements, which changes in social and economic conditions had rendered necessary.

[1] Aldred's Case (1611) 9 Co. Rep. at f. 59a.
[2] Denton v. Auction Mart Co. (1866) L.R. 2 Eq. at p. 252.
[3] Webb v. Bird (1861) 10 C.B. N.S. 268; 13 C.B. N.S. 841.
[4] This was at one time doubted, see Cable v. Bryant [1908] 1 Ch. at pp. 263-264 *per* Neville, J.
[5] Alden v. Latimer Clerk [1894] 2 Ch. at pp. 445-446.
[6] Crump v. Lambert (1867) L.R. 3 Eq. at p. 413.
[7] 2 Rolle Ab. 564, overruling Slingsby v. Barnard (1617) 1 Rolle Rep. 430, where it was apparently held that the right of support for a building was a natural right, see Dalton v. Angus (1881) 6 A.C. at p. 742-743 *per* Pollock, B.
[8] Palmer v. Fleshes (1663) 1 Sid. 167.
[9] Gale, op. cit. 331; cp. Halsbury, Laws of England xi 326.
[10] 6 A.C. 740.

Prescription

By the end of the mediæval period the main characteristics of the doctrine of prescription at common law had been attained; and, in the sixteenth century, the manner in which the doctrine operated to confer a title was also settled.[1] It was well recognized that the user of easements and profits from before the time of legal memory supplied the place of a grant, and, for that reason, operated to confer a title by prescription. It followed, therefore, firstly, that no such title could be acquired unless a grant of the thing was legally possible;[2] secondly, that no prescriptive title could be acquired which was contrary to common or statute law;[3] and, thirdly, that if a man set up a prescriptive title to an incorporeal thing, another inconsistent title to the same thing, supported by prescription or custom, could not be set up,[4] unless the first prescription was traversed.[5] It was settled also that the rules, which Bracton had copied from the Roman law as to the nature of the user required to found a prescriptive right, were part of English law. In English, as in Roman law, that user must be nec vi nec clam nec precario.[6] We must now trace the steps by which this doctrine of prescription at common law was supplemented by the action, firstly of the courts and secondly of the Legislature. I shall deal with the history of this topic under these two heads.

(1) *The action of the courts.*

The time of legal memory was a specific date—1 Richard I. (1189)—which was fixed by analogy to the period of limitation established in 1275 for a writ of right.[7] When the Legislature in 1540 abridged the period of limitation, in a writ of right to sixty years, and in assizes of mortd'ancestor writs of cosinage aiel and

[1] Vol. iii 169-171.

[2] Ibid 170-171; "Nothing can be prescribed for, that cannot at this day be raised by grant. For the law allows prescriptions, but in supply of the loss of a grant; . . . and therefore for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good," *per* S'r F. North *arg.* Potter v. North (1674) 1 Ventris at p. 387.

[3] Co. Litt, 115a; 2 Rolle, Ab. *Prescription* 267.

[4] "When a man has a lawful easement or profit, by prescription from time whereof etc., another custom, which is also from time whereof etc., cannot take it away, for the one custom is as ancient as the other: as if one has a way over the land of A to his freehold by prescription from time whereof etc., A cannot allege a prescription or custom to stop the said way," Aldred's Case (1611) 9 Co. Rep. at f. 58b.

[5] Russel and Broker's Case (1587) 2 Leo. 209.

[6] "Item ex longo usu sine constitutione cum pacifica possessione, continua et non interrupta, ex scientia negligentia et patentia dominorum, . . . ita quod nec per vim, nec clam, nec precario ut supra," Bracton f. 222b; Co. Litt. 113b, 114a; cp. vol. ii 284 n. 2; vol. iii 166.

[7] Ibid 8, 166.

entry sur disseisin to fifty years,[1] the courts might, as Rolle suggested in his Abridgement,[2] have continued to pursue the analogy established in 1275, and have shortened the period of prescription to sixty years. But, as Rolle says, they did not pursue this course;[3] and the reasons are, I think, somewhat as follows: Firstly, even when Littleton wrote, it was the opinion of some, that the rule that "usage whereof the mind of man runneth not to the contrary" gave a prescriptive title, was at common law, and was independent of any statute of limitation.[4] Certainly by the year 1540 the rule that such usage conferred a good title had hardened into a fixed rule. In the opinion of some it had always been independent; and, though the view that the time was literally "usage whereof the mind of man runneth not to the contrary" did not prevail,[5] it may have helped to establish the rule that the time of legal memory was independent of any time which the Legislature might fix as the period of limitation in the proceedings upon particular writs. Secondly, the statute of 1540 only fixed a period of limitation for certain named writs;[6] and among those writs were not included the assize of nuisance, and those other writs in the real actions[7] by which the right to incorporeal hereditaments could be asserted. If the statute had included these writs it is just possible that the courts might have pursued the analogy of the statute; or, if they had not followed it, that they might have treated it, as they eventually treated James I.'s statute of limitation,[8] and used the period so fixed as an index to the period which would afford at any rate presumptive evidence of enjoyment from before the time of legal memory.[9] For it should be noted that the statute of James I. applied to actions on the case, which

[1] 32 Henry VIII. c. 2; vol. iv 484.

[2] "Semble que come le temps de memorie en un prescription fuit limit al temps de R.I. solonque ceo un seisin en un briefe de droit deins l'equitie del statut de R.I., issint que per mesme reason le temps de memorie a cest jour serra limit al 60 ans, come un brief de droit deins le equitie del statut de 32 H. 8 cap. 2, car ceo est deins mesme mischiefe parle en le preamble de statut; mes jeo bien conus, que le practice est *e contra*," 2 Rolle, Ab. *Prescription* 269 M. pl. 16.

[3] This seems clear from Rolle, in spite of Gale's doubts, op. cit. 168-169.

[4] "And others have said, that well and truth it is, that seisin and continuance after the limitation etc. is a title of prescription as is aforesaid, and by the cause aforesaid. But they have said that there is also another title of prescription, that was at the common law before any statute of limitation of writs etc., and that it was where a custom or usage, or other thing hath been used for time whereof the mind of man runneth not to the contrary. . . . And insomuch that such title of prescription was at the common law, and not put out by a statute, *ergo* it abideth as it was at the common law; and the rather, insomuch that the said limitation of a writ of right is of so long time passed. *Ideo quære de hoc*," § 170; vol. iii 166 n. 5; this view, which was not apparently favoured by Littleton, is passed over by Coke, which is a pretty clear proof that it was then obsolete.

[5] Last note.

[6] Vol. iv 484.

[7] Vol. iii 11, 19-20.

[8] 21 James I. c. 16; vol. iv 485.

[9] Below 348-349.

actions were, as we have seen,[1] at that time fast superseding the real actions provided for the protection of the right to incorporeal hereditaments. Whether or no these were the true reasons for the action of the courts, it is clear that they did not follow the analogy of the statute of 1540. In Elizabeth's reign it was held that an enjoyment for thirty or forty years was insufficient to establish a prescriptive title, because it was obvious that the enjoyment had begun since the time of legal memory.[2]

It is clear, however, that this doctrine was productive of considerable hardship; and the hardship grew greater, as, with the lapse of time, the period of legal memory receded further into the past. Littleton tells us that the inconvenience arising from length of the period within which a writ of right could be brought, was used as an argument by those who contended that, by the common law, the length of time within which a title could be gained by prescription was literally, "time whereof the memory of man runneth not to the contrary, that is as much as to say, when such a matter is pleaded that no man then alive has heard any proof to the contrary, nor hath no knowledge to the contrary."[3] It is not surprising, therefore, that, though this suggestion was not followed, the courts should endeavour to attain the results desired by those who advocated this doctrine, by holding that proof of enjoyment as far back as living witnesses could speak, raised a presumption of enjoyment from before the year 1189.[4] No doubt in many cases this presumption enabled the courts to do substantial justice. But there were very serious limitations upon its operation; and, in cases in which it could not operate, all the inconveniences of the length of the prescriptive period allowed by the common law appeared. Thus, as the Real Property Commissioners pointed, out in 1829,[5] "a right claimed by prescription is always disproved by shewing that it did not or could not exist at any one point of time since the commencement of legal memory, or, although it originated before the commencement of legal memory, that at some subsequent period the servient tenement . . . and the dominant tenement . . . once belonged to the same individual, whereby the prescriptive right was extinguished."

To obviate these inconveniences recourse was had to a new device, which was suggested by, if it did not originate in, the rule that every prescriptive title is founded on a presumed grant made before the time of legal memory.[6] The essence of this new device is the rule that, in order to support a title by long possession to some incorporeal thing, a grant of that thing will be presumed.

[1] Above 21-22.
[2] Bury v. Pope (1588) Cro. Eliza. 118; S.C. 1 Leo. 168.
[3] § 170.
[4] Real Property Commission, First Report 51.
[5] Ibid.
[6] Above 343; vol. iii 169-170.

The origin of this device is probably a resolution of Lord Chancellor Ellesmere and "the principal judges" in the case of *Bedle v. Wingfield* in 1607.[1] In that case, Coke tells us, it was resolved that, in aid of ancient and long continued possession of an incorporeal thing [in that case an advowson], the law would presume that a grant of that thing had been made. "If these objections and exceptions," it was said, "had been made in the lives of the parties, without any question they had been answered; or otherwise, in so many successions of ages, it [the title to the advowson in question] would have been impeached or impugned."[2] This rule was followed. In the case of *Read v. Brookman* in 1789 Buller, J., said[3] that, "for these last two hundred years it has been considered as clear law that grants, letters patents, and records, may be presumed from length of time." But, though this rule to some extent mitigated the inconvenience of prescription at common law, its operation was for a long time limited by the strictness of the common law rules as to the need of making profert of any deed pleaded by a party who meant to rely upon it. It had been laid down by Coke in *Doctor Leyfield's Case*[4] that a person who pleaded a deed must bring it into court, in order that the court might judge of its sufficiency;[5] and that practically the only excuses for its non-production were either the fact that it was rightfully in the possession of some other person, or the fact that it was in the possession of the adverse party,[6] or the fact that it was in the same or another court.[7] It is true that Coke admits that "in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that such appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction; and if the jury find it, although it be not shewed forth in evidence, it shall be good enough."[8] But even in such extremities, the party to the action seeking to rely on a lost deed, was not originally excused from making in his pleading a profert of it: all he could do in such a case was to plead and make pro-

[1] 12 Co. Rep. 4.
[2] At p. 5.
[3] 3 T.R. at p. 158.
[4] (1611) 10 Co. Rep. 88a.
[5] "It is dangerous to suffer any who by the law in pleading ought to show the deed itself to the court, upon the general issue to prove in evidence to the jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases, will not appear to the court; or peradventure the deed may be upon condition, limitation, with power of revocation, and by this way truth and justice and the true reason of the common law would be subverted," ibid at f. 92b.
[6] Ibid at ff. 92a, 94b; cp. Read v. Brookman (1789) 3 T.R. at p. 161 *per* Grose, J.; for other less important exceptions see ibid at p. 156 *per* Lord Kenyon, C.J.
[7] Wymark's Case (1594) 5 Co. Rep. at ff. 74b, 75a.
[8] 10 Co. Rep. at f. 92b.

fert of it, and, on the general issue, give evidence of the loss, and persuade the jury, if he could, to find its existence.[1] This course was only open to the plaintiff in an action;[2] and it was so difficult a course to pursue that, in such cases, the parties who wished to plead and rely on a lost deed, always went to a court of equity to get an injunction to restrain the adverse party from taking advantage of the fact that there had been no profert.[3] But it would seem that, about the middle of the eighteenth century, the courts of law, probably in consequence of this action of courts of equity,[4] began to relax their strict rules;[5] and in 1789, in the case of *Read v. Brookman*,[6] the court of King's Bench, Grose, J., dissenting, approved the modern practice, and held that if a deed was lost by time and accident its existence could be pleaded, and that there was no need to make profert of it. But it may be noted that, such was the vitality of this old pleading rule, that it was held in 1808 that, though no profert need be made, the material contents of the lost deed must be set forth in pleading, just as in the case of a deed which was capable of production.[7]

It was the relaxation of this rule as to profert which rendered possible the development of the device of a presumed lost grant. The connection between these two phenomena is obvious from what Lord Kenyon said in his judgment in *Read v. Brookman*.[8] He there recounted a conversation which he had had with Yates, J., on the case of *Keymer v. Summers*. This was an action on the case for obstructing a way, which Yates, J., had tried at the Hereford assizes. "It appeared," he said, "on the trial, that there had been an absolute extinguishment of the right of way some years back, by the unity of possession of the way and of the land through which the way led: but Yates, J., directed the jury to presume a grant from a possession of nearly thirty years. And to a question put by me to that judge, how the plaintiff could

[1] 3 T.R. at p. 161 *per* Grose, J., dissenting; Soresby v. Sparrow (1733) 2 Stra. 1186; it was argued in Whitfield v. Fausset (1749-1750) 1 Ves. Sen. at p. 393 that at law a plaintiff could "aver the deed to be lost and so be excused from making profert"; but Lord Hardwicke said that "there is no book, case, printed entry, or even modern authority, where that has been established to be good pleading."

[2] Read v. Brookman (1789) 3 T.R. at pp. 154, 162.

[3] 1 Ves. Sen. at p. 392-393; cp. 2 Ves. Sen., Belt's Supplement 163.

[4] "It is not a very pleasant thing for a court of law to say, that they cannot administer justice on legal titles because they are fettered with certain forms," Read v. Brookman (1789) 3 T.R. at p. 156 *per* Lord Kenyon, C.J.

[5] It is stated in a note to Read v. Brookman (1789) 3 T.R. at p. 155 that the practice had been so modified for many years past; Grose, J., at pp. 161-162 admitted this, but contended that this modern practice could not overrule the established law.

[6] 3 T.R. 151.

[7] Hendy v. Stephenson 10 East 55; in that case at p. 60 Lord Ellenborough admitted that "the case of Read v. Brookman went a step further than the cases had gone before"; under the modern practice this pleading rule has disappeared, Palmer v. Guadagni [1906] 2 Ch. 494.

[8] (1789) 3 T.R. at p. 157.

have pleaded that matter to an action of trespass brought against him, he answered, that he might plead a non-existing grant. That was his opinion, and it is warranted by practice." It is not therefore surprising to find that the change in the practice as to profert, and the beginnings of the modern doctrine as to a presumed lost grant, are practically contemporaneous. In 1761, in the case of *Price v. Lewis*,[1] Wilmot, J., said that the enjoyment of the right to light for forty years was sufficient to induce a presumption that "there was originally some agreement between the parties"; and, proceeding on the analogy of James I.'s statute of limitation, he gave it as his opinion that twenty years enjoyment was sufficient to induce such a presumption. It would appear that Wilmot, J., thought that, as twenty years was an absolute bar to an action of ejectment, so it ought to confer an absolute title to an incorporeal right. But this by no means followed. As Lord Mansfield explained in *Darwin v. Upton* in 1786,[2] twenty years user only amounted to "such decisive presumption of a right by grant or otherwise that, unless contradicted or explained, the jury ought to believe it." It could not establish the right absolutely, in the same manner as the statute of limitation absolutely barred the right of action; and with this view of the law Willes, J., and afterwards Buller, Ashhurst and Gould, JJ., apparently concurred.

It is therefore clear that, during the last quarter of the eighteenth century, the courts had laid it down that it was open to a party seeking to establish a right to an incorporeal hereditament by prescription, to plead that a grant of the hereditament had been made to him and lost; and that proof of twenty years user, if unexplained, would be presumptive evidence from which a jury could infer the truth of his plea. That this device had become common in the early years of the nineteenth century is proved by the Report of the Real Property Commissioners. It is also clear that, when they prepared their Report, this device of inferring from twenty years user a title based upon a lost grant depended solely upon a rebuttable presumption of law.[3] But, in these circumstances, it was inevitable that a further development

[1] 2 Wms. Saunders 175 n. (2) to the case of Yard v. Ford. [2] Ibid.

[3] "Amidst these difficulties, it has been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory . . . to resort to the clumsy fiction of a lost grant. . . . But besides the objection of its being well known to the counsel, judge, and jury that the plea is unfounded in fact, the object is often frustrated by proof of the title of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the plea. The contrivance therefore affords only a chance of protection, and may stimulate the adversary to an investigation for an indirect and mischievous end of ancient title deeds, which for every fair purpose have long ceased to be of any use," First Report 51.

of this doctrine would be attempted. The strength of the presumption had been increasing, and its rebuttable character had been receding into the background. Hence it was natural that some lawyers should come to think that the presumption was irrebuttable—that it was not merely a presumptio juris, but a presumptio juris et de jure.[1]

The question whether this development has ever become an established part of the law is still unsettled.[2] That it was in fact a development and a change in the law as understood in the eighteenth century is I think clear.[3] I do not think that Lord Blackburn's view that all that was left to the jury was the character of the enjoyment, and that the presumption of the existence of the supposed grant was irrebuttable after proof of an user as of right for twenty years,[4] is consistent with the history of the doctrine, or with the decisions of the latter part of the eighteenth century. On the other hand, there is obviously much to be said for the view that, to some extent before, and certainly to a larger extent after the passing of the Prescription Act, it was coming to be thought that, after twenty years user, the presumption of the existence of a grant was irrebuttable.[5] However that may be, the case of *Angus v. Dalton* showed that in 1881 the judges were hopelessly divided on this point. It shows that this, the last development needed to perfect the acquisition of a title by a presumed lost grant, had not yet become an established rule of law.

Thus, the action of the courts in developing a law of prescription, had produced a body of rules which were neither certain nor convenient. A litigant who relied on prescription at common law might succeed if he could show thirty or forty years user. On the other hand, a litigant who could show eighty or a hundred years user might fail, if e.g. unity of seisin were proved to have existed some two centuries ago. A litigant who relied on the

[1] Thus in The King v. Joliffe (1823) 2 B. and C. at p. 59 Abbott, C.J., said, "Upon the evidence given uncontradicted and unexplained I think the learned judge did right in telling the jury that it was cogent evidence upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had recommended them to find such a verdict I should have thought that the recommendation was fit and proper. A regular usage for twenty years uncontradicted and unexplained is that upon which many private and public rights are held"; Parke, B., in Bright v. Walker (1834) 1 C.M. and R. at p. 217, speaking of the practice before the Prescription Act 1832 said, "though in theory it was presumptive evidence, in practice and effect it was a bar"; cp. Jenkins v. Harvey (1835) ibid 877.

[2] That evidence to contradict the grant was admissible was the opinion of Cockburn, C.J., in Angus v. Dalton (1877) 3 Q.B.D. at p. 130; of Brett, L.J., and Bowen, J., in the same case, 4 Q.B.D. at p. 201, 6 A.C. at p. 782; Bowen, J., indeed, said that the presumption was nothing more than "a rebuttable presumption of fact." On the other hand, in the opinion of Lindley, J., 6 A.C. at p. 765, and of Lord Blackburn, ibid at pp. 812-814, evidence to contradict the grant was inadmissible.

[3] See the judgment of Cockburn, C.J., 3 Q.B.D. at pp. 106-118, 120-130.

[4] 6 A.C. at pp. 813, 814.

[5] Gale, op. cit. 172.

presumption of a lost grant would probably succeed if he could prove twenty years user as of right. But was evidence admissible to prove that no such grant was ever made? And if a jury did not believe that such a grant had ever been made, could they find against him? On this matter no certain conclusion had been reached.

We shall now see that the attempt of the Legislature to remedy this state of the law has produced, if possible, even worse results.

(2) *The action of the Legislature.*

The Real Property Commissioners suggested in substance that, with respect to profits and easements, legal memory should "always be taken to be sixty years *ante litem motam*, or rather that adverse enjoyment during this period . . . should be conclusive evidence of a right to such profit or easement." Sixty years user therefore was to give a good title. But the shorter period of twenty years was to afford "presumptive evidence of a right, liable to be rebutted by proof that during that time the servient tenement was occupied under a lease, or was held by a tenant for life, or by a person under disability."[1] The recommendations of the Commissioners were partially carried into effect by the Prescription Act of 1832,[2] which was drawn up by Lord Tenderden. By reason both of the character of its provisions, and of the carelessness of its drafting, it has added to the complication and to the unreasonableness of this branch of the law. Let us glance rapidly at one or two of its defects.

One of its greatest defects is the provision, that the periods fixed for the user of the rights therein dealt with, "shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been . . . brought into question, and that no act . . . shall be deemed to be an interruption . . . unless the same shall have been . . . submitted to or acquiesced in for one year after the party interrupted shall have had . . . notice thereof."[3] It follows from this provision that an enjoyment, for a period longer than that fixed by the Act, will not confer a title, unless, at the end of it, there is a litigation as to the existence of the right;[4] and that if, at the end of that longer period, and before the litigation begins, there is an interruption acquiesced in for longer than one year, no claim can be made under the Act.[5] For this defect the framers of the Act are not wholly responsible. The Real Property Commissioners, as we have seen, suggested

[1] First Report, 51-52. [2] 2, 3 William IV. c. 71. [3] § 4.
[4] Goddard, Easements (5th ed.) 212-213. [5] Ibid 213-214.

that the period should be reckoned *ante litem motam.* But we naturally ask, Why should this absurd suggestion have been made? Why should not the completed period fixed by the Act have conferred a good title?

It seems to me that the answer is, that both the framers of the Act, and the Real Property Commissioners, were guilty of confusing the mode of the operation of a statute of limitation, and the mode of the operation of prescription. A statute of limitation generally only bars the right of action, and must generally be pleaded as a defence by the person who wishes to rely on it. The person who wishes to rely on it is in possession, and till his right to possession is disputed he has all the rights of ownership. It is not therefore unreasonable to reckon the period of possession, which will bar the action, backwards from the time when the action is brought, and say that possession for a fixed period before action brought shall bar the action. On the other hand, prescription confers a positive title to the property upon the person who has enjoyed it for the fixed period. It affects title, not rights of action. Therefore the period of the beginning of the enjoyment should be alone regarded, and enjoyment from that period for the required time should confer a title, whether or no that enjoyment has been called in question. But, when the Prescription Act was passed, the statute of 1540[1] was in force. That statute was both a statute of limitation and a prescription Act. It was a statute of limitation in so far as it applied to corporeal hereditaments; it was a prescription Act in so far as it applied to such incorporeal hereditaments as could be recovered in a writ of right. In so far as it was a statute of limitation, applicable to corporeal hereditaments, it reckoned the period backwards from the date of the writ beginning the action; in so far as it was a prescription Act, applicable to certain incorporeal hereditaments, it reckoned the period forward from the beginning of the enjoyment.[2] But, as the Act is obscurely worded, and as

[1] 32 Henry VIII. c. 2.

[2] This will be clear from the wording of § 1 of the Act, which runs as follows: "No maner of personne or personnes shall fromhensfurth sue have or maintene any writte of right, or make any prescription title or clayme of to or for any manours landis tenementes rentes annuities commons pencions poorcions corredis or other hereditamentis. . . . Within three score yeris next bifore the teste of the same writte or next bifore the said prescripcion title or claime so herafter to be sued commensed broughte made or hadde"; no doubt the words are thrown about somewhat wildly; but I think that the idea of the framer was that the sixty years should be reckoned backwards from the teste of the writ brought for corporeal hereditaments, and that the prescription for incorporeal hereditaments, which would bar a similar writ, was to date from the time when it "commensed"—i.e. from the beginning of the enjoyment of the right; it may be noted that the Real Property Limitation Act of 1833, 3, 4 William IV. c. 27 § 2, which barred the title as well as the right of action, made the period of limitation run from "the time at which the right to make such entry or distress or to bring such action shall have first accrued."

the learning relating to these incorporeal hereditaments recoverable by writ of right had fallen into desuetude, neither the Commissioners nor the framers of the Prescription Act observed the distinction. They adopted the wording of the part of the Act applicable to writs of right brought for corporeal hereditaments, and applied it to the very different topic of the acquisition by prescription of that class of incorporeal hereditaments known as easements and profits.

The second defect of the Act is that it left quite uncertain what easements and profits come within the scope of the Act. Until the decision in the case of *Angus v. Dalton*,[1] it was more than doubtful whether the easement of support came within it. It is not even now certain whether rights in gross are within its scope.[2]

Connected with this defect is its third defect—the carelessness with which it is drafted. Its reference in § 8 to "any such way or other *convenient* water-course" has puzzled generations of judges and text writers. The interpretation of its provisions with regard to the easement of light, which are quite different from its provisions with regard to other easements, long remained doubtful.[3]

The first two defects are perhaps the most serious. At any rate, it is due to them that the courts rightly felt that they could not do otherwise than hold that the Act does not do away with the older modes of acquiring a prescriptive title, but merely adds another equally defective mode.[4] Hence it would, I think, be true to say that there is no branch of English law which is in a more unsatisfactory state. There are, indeed, other branches of English law which stand in need of an intelligent restatement; but no mere restatement can clear up the muddle which the courts and the Legislature have combined to make of the law of prescription. What is required is a total repeal of the existing common and statute law, and the substitution of an entirely new set of rules, based upon an understanding of the meaning of the doctrine of prescription, and of the results at which it should aim.

[1] (1881) 6 A.C. 740.

[2] In Shuttleworth v. Le Fleming (1865) 19 C.B.N.S. 687 it was decided that the wording of § 5 of the Act excluded them; but in Mercer v. Denne [1905] 2 Ch. at p. 588 Cozens-Hardy, L.J., said that this and other similar decisions were open to review in the court of Appeal, and stated that he at present expressed no opinion on this question.

[3] § 3; Goddard, Easements (5th ed.) 276-289.

[4] "It [the Act] did not abolish the old doctrine; if it had, old rights even from time immemorial would have been put an end to by unity of occupation for the space of a year. But this was not done; . . . I think the law, as far as regards this subject, is the same as it was before that Act was passed," Angus v. Dalton (1881) 6 A.C. at p. 814 *per* Lord Blackburn.

§ 10. Conveyancing

In the preceding Book of this History I have sketched the development of the various modes of conveying interests in land held by the free tenures, for a term of years, and by copyhold tenure.[1] We have seen that the forms required for the creation or transfer of freehold interests in land are very similar to the forms required for the creation or transfer of interests for terms of years; but that the form required for the creation or transfer of interests in copyholds—the surrender and admittance—diverges very widely from the form required for freeholds. The powers of the copyholder to deal with his property tend, indeed, both in this period and the last, to follow the developments of the law relating to freehold interests. In the preceding period, the provisions of the statute De Donis had been extended to copyholds on many manors; and the copyhold tenant on these manors had therefore the same power of entailing his lands as the freeholder.[2] In this period the copyholder got in most cases a power to devise;[3] and, though the statute of Uses did not apply to copyholds,[4] the machinery of the use and the equitable trust added to his powers of disposition, in much the same way as it added to the powers of the freeholder.[5] But, down to the present day, the mediæval divergence between the form of the freeholder's and the copyholder's conveyance has been maintained. The copyholder has not been affected by the later developments in the forms of conveyance, and his interest is still conveyed by surrender and admittance.

We have seen that in the Middle Ages the forms of conveyance at the disposal of the freeholder fell into two main classes—those which took effect by the act of the parties, and those which depended for their efficacy upon the machinery of the court.[6] We have seen that under the first head fell feoffments with livery of seisin, releases, surrenders, confirmations, exchanges, partitions, and, for incorporeal things, deeds of grant;[7] and that under the second head fell fines and recoveries.[8] We have seen too that the most essential part of a conveyance of corporeal hereditaments was the livery of seisin. Unless the feoffee was already in possession, an actual livery of seisin was required;[9] and even in the case of some of these incorporeal things which lay in grant, something equivalent—such as attornment or actual user of the right granted—was required.[10] A lease for a term of years created only an interesse termini till the lessee had entered;[11] and in the case of

[1] Vol. iii 217-256.
[2] Above 302-303; vol. ii 381.
[3] Below 366-367.
[4] Above 301.
[5] Sanders, Uses (5th ed.) i 249 n.; below 380-381.
[6] Vol. iii 220-221.
[7] Ibid 221-234.
[8] Ibid 234-246.
[9] Ibid 221-225, 232.
[10] Ibid 97-101.
[11] Ibid 249.

the earliest forms of fine, and in the case of the recovery, seisin must be delivered by the sheriff in pursuance of the order of the court.[1] But we have seen that in some of the forms of fine the property passed without the livery of seisin by the sheriff ;[2] and that it was coming to be recognized that a right to incorporeal things passed by mere deed of grant.[3] We have seen, too, that in the case of all conveyances, the need to indicate the intent with which seisin had been delivered, and to define the rights and duties of the various parties to different dispositions of property, had made a deed, and often a very elaborate deed, a necessary accompaniment to a livery of seisin.[4] The forms of these deeds, whether deeds poll or indentures, and their contents, had already attained fixity in the mediæval period ; and though, in this period, their contents were necessarily modified by changes in the law, they are the basis upon which the modern system of conveyancing has been built up.

Just as in other branches of the land law mediæval rules retained their importance, because they were the basis upon which the modern law was founded, so in the law of conveyancing—all the mediæval modes of conveyance continued to be available to landowners all through this period and long after ; and many are still theoretically possible at the present day, though in some cases, the results of their employment have been modified by the Legislature.[5] We shall see that they still continued to be used by the conveyancers till the reforms of the nineteenth century, because results could be effected by such conveyances as e.g. a fine or a feoffment, which could be effected in no other way.[6] But, just as in other branches of the land law mediæval rules and doctrines tended to become modified, and sometimes to be superseded, by the new rules which had grown up during this period, so in the law of conveyancing, these mediæval modes of conveyance tended, for ordinary purposes, to be superseded by the new modes of conveyance, which the rise of uses and the passing of the statute of Uses had rendered possible ; and what was in substance a new mode of conveyance sprang up, in consequence of the power to devise lands conferred by Henry VIII.'s statutes of Wills.[7]

These new modes of conveyance affected the law of conveyancing in three main directions :—In the first place, they made it possible to create or transfer an estate in the land without an actual livery of seisin. For this reason the deed or other document which evidences the transfer became in most cases, and, after the

[1] Vol. iii 238, 241-242, 246.
[2] Ibid 238-239, 241-242.
[3] Ibid 98-99.
[4] Ibid 225.
[5] Above 78.
[6] Below 382-383.
[7] 32 Henry VIII. c. 1 ; 34, 35 Henry VIII. c. 5 ; vol. iv. 465-466.

passing of the statute of Frauds,[1] in all cases, the essential and necessary element in a conveyance. In this way a great impetus was given to the tendency, which was proceeding all through the mediæval period, to make the deed, which evidenced the intent with which livery of seisin was delivered, of more importance than the actual livery of seisin. In the second place, the greatly increased powers of disposition which the statutes of Uses and Wills conferred upon landowners necessarily added to the complication of the instruments by which these powers of disposition were exercised. To the powers which the landowners had under the older law, there were added the powers which they had acquired under the new law; and, in order to enable them to make the most extensive use of these powers, the conveyancers made use of all forms of conveyance, new and old, to carry out the wishes of their clients. Fines, recoveries, and feoffments were all made to play a part in those elaborate settlements of land, by which its devolution to a succession of limited owners was fixed, by which it was charged with sums of money in favour of other persons, by which its proper management was provided for by means of powers of appointment.[2] In the third place, in their work of thus adapting the law of conveyancing to the modern land law, the lawyers were allowed a very free hand. Till the reforms of the nineteenth century, the only two statutes of general importance which directly affected the law were the statute of Enrolments[3] and the statute of Frauds.[4] Thus the whole system of modern conveyancing was the joint work of the courts and the conveyancers. The courts laid down the general principles of the law, and interpreted the conveyances by which property was disposed of in accordance with these principles. The conveyancers created the common forms, which carried out the wishes of their clients, in such a way that they conformed to the rulings of the courts.[5] But the elaboration of the art of conveyancing, which was the necessary consequence of the elaboration of the law, had made the conveyancer's business a very special branch of legal knowledge. Hence, when the main principles of the modern law had been settled by the courts in the sixteenth, seventeenth and eighteenth centuries, the practice of these conveyancers, who settled the common forms which carried out in practice the principles of the law, tended to be treated by the courts as such cogent evidence of the law, that it can be regarded almost as a secondary source of law.[6]

[1] 29 Charles II. c. 3 §§ 1-3; vol. vi 384-385.
[2] Below 376-381.
[3] 27 Henry VIII. c. 16; vol. iv 427, 462.
[4] 29 Charles II. c. 3; vol. vi 384-385.
[5] Vol. iii 218.
[6] Below 384-387.

These then are the leading features of the history of conveyancing during this period. I shall relate that history under the following heads: The New Forms of Conveyance which Depend on the Statute of Uses; the Devise; the Leading Types of Conveyance and their Contents; the Practice of the Conveyancers and the Law.

The New Forms of Conveyance which Depend on the Statute of Uses

We have already seen that the direct result of the statute of Uses and the statute of Enrolments was to make a bargain and sale of a freehold interest in lands, if enrolled within six months, operative to convey the legal estate in that interest;[1] and that, in the course of the sixteenth century, a covenant to stand seised for good consideration came to have the same effect.[2] But we shall see that these two new conveyances suffered from several defects, which prevented them from wholly superseding the older modes of conveyance;[3] and that, at the beginning of the seventeenth century, they were being superseded by the conveyance by way of bargain and sale for a term, followed by a common law release. This conveyance, being free from many of the defects of the bargain and sale of a freehold interest enrolled, and of the covenant to stand seised, became the most general mode of conveyance for the creation and transfer of all kinds of interests in real property;[4] and it continued to hold this position till it was superseded by the new conveyances introduced by the legislation of the nineteenth century. I shall therefore consider, in the first place, the bargain and sale enrolled, and the covenant to stand seised; and, in the second place, the bargain and sale for a term coupled with a release.

(1) *The bargain and sale enrolled, and the covenant to stand seised.*

During the sixteenth and seventeenth centuries certain rules grew up, as to the conditions under which a bargain and sale enrolled, and a covenant to stand seised, could operate as valid conveyances. I shall first of all say something of two matters in which these two conveyances resembled one another; in the second place, I shall deal separately with the rules peculiar to each; and, in the third place, I shall say something of the defects which caused them to give place to the bargain and sale for a term, coupled with a release.

[1] Vol. iv 462, 468.
[2] Ibid 426-427.
[3] Below 359-360.
[4] Below 360-362.

(i) Both a bargain and sale and a covenant to stand seised were, unlike a feoffment, "innocent" conveyances.[1] They could not therefore "work a discontinuance, create a forfeiture, nor destroy contingent remainders dependent upon a particular estate";[2] and the grantor could only convey by them the estate to which he was actually entitled. Thus it was held in 1593[3] that a covenant to stand seised to a use of lands, which the covenantor should afterwards purchase, was void, "for a man cannot by a covenant raise an use out of land which he hath not; for no more than a man may charge let or grant a thing which he hath not, no more may he limit an use out of land which he hath not."[4]

To convey lands by bargain and sale[5] or covenant to stand seised,[6] no particular operative words were needed—any words which clearly showed the intent thus to convey were sufficient. On the other hand, it seems to have been thought in the sixteenth century that, if a conveyance might operate either at common law or by virtue of the statute of Uses, it must operate at common law, in the absence of any expressed intention to the contrary.[7] A fortiori it followed that if the intention was to convey by a common law assurance, and not by an assurance operating by virtue of the statute of Uses, it could only operate at common law—at any rate if an assurance operating by virtue of the statute of Uses would alter the rights of the parties.[8] But the practical application of this rule was by no means clear;[9] the rule that an assurance which might operate at common law, must so operate in the absence of an intention to the contrary, came to be doubted;[10] and later cases show that an assurance which might operate either at common law or by virtue of the statute, will be construed to operate in such a manner as will

[1] Sanders, Uses ii 64 and cases there cited, 101. [2] Ibid 64.
[3] Yelverton v. Yelverton Cro. Eliza. 401; S.C. Moore 342.
[4] Cro. Eliza. at p. 402.
[5] Fox's Case (1610) 8 Co. Rep. at f. 94a; Sanders, Uses ii 59.
[6] Lade v. Baker (1690) 2 Vent. 149; Sanders, Uses ii 96-97.
[7] "There were some opinions, that when conveyances may enure two ways, the common law shall be preferred, unless it appear that the party intended it should pass by the statute," Barker v. Keat (1677) 2 Mod. at p. 252 *per* North, C.J.; cp. Co. Litt. 49a—"the state at common law shall be preferred"; Heyward's Case (1595) 2 Co. Rep. at f. 35b.
[8] "If the father make a charter of feoffment to his son, and a letter of attorney to make livery, and no livery is made, yet no use shall arise to the son, because he should be in by the statute in another degree, viz. in the *post*," Co. Litt. 49a; Fox's Case (1610) 8 Co. Rep. at f. 94a.
[9] Thus the contrary to that laid down by Coke in Fox's Case was laid down by the Court in 1572, 3 Leo. 16, and was followed in 1635, 2 Rolle, Ab. 787 pl. 5.
[10] Barker v. Keat (1677) 2 Mod. at p. 252, cited above n. 7; and even Coke admitted that the rule did not apply when a lease for years might be taken either as a common law demise or as a bargain and sale, Heyward's Case (1595) 2 Co. Rep. at f. 35b.

best give effect to the intentions of the parties.[1] We shall see that the same principle came to be applied in cases where the question arose whether a conveyance should operate as a bargain and sale, or as a covenant to stand seised.[2]

(ii) The essence of the conveyance by bargain and sale was the pecuniary consideration. That consideration must therefore exist;[3] but it was soon settled that its value was immaterial.[4] It might be merely nominal; and it need not be stated in the conveyance; for, if not stated, it could be averred and proved.[5] It need not move from the person or persons to whom the property was to be conveyed. In the *Case of Sutton's Hospital* it was held that a consideration, moving from the trustees in their natural capacity, would support a bargain and sale to the corporation;[6] and, "in consideration of certain monies given by B a man can covenant to stand seised to the use of A for life, remainder to C in fee; for here it is apparent that the monies were given for both estates; and though A and C are strangers to the gift of the monies, still they are sufficiently privy, seeing that they are given on their behalf."[7]

That a bargain and sale of a freehold interest might operate as a conveyance, it must, as a rule, be enrolled within six months —[8] "accounted after the computation of 28 days to the month."[9] But the conveyance took effect from the bargain and sale.[10] It is true that if, after the bargain and sale and before enrolment,[11] the bargainor enfeoffed or levied a fine in favour of the bargainee, the bargainee was in by virtue of the fine or feoffment,[12] partly by reason of the wording of the statute of Enrolments,[13] and partly by reason of the rule that the common law conveyance was pre-

[1] Crossing v. Scudamore (1671) 1 Vent. 137; Stapilton v. Stapilton (1739) 1 Atk. at p. 8; Roe d. Wilkinson v. Tranmer (1757) 2 Wils. 75; Haggerston v. Hanbury (1826) 5 B. and C. at pp. 103-104.

[2] Below 359.

[3] "An use cannot be raised by any covenant or proviso, or by bargain and sale, upon a general consideration; and therefore if a man by deed indented and inrolled according to the statute, for divers good considerations, bargains and sells his lands to another and his heirs, *nihil operatur inde*," Mildmay's Case (1582-1584) 1 Co. Rep. at f. 176a.

[4] Case of Sutton's Hospital (1613) 10 Co. Rep. at f. 34a—a consideration of twelve pence.

[5] Fisher v. Smith (1599) Moore 569.

[6] 10 Co. Rep. at f. 34a.

[7] 2 Rolle, Ab. 784 pl. 6; see also ibid pl. 7.

[8] 27 Henry VIII. c. 16; there was a saving for lands in towns where the mayor or other officers had authority to enroll conveyances.

[9] Second Instit. 674.

[10] Ibid 674-675.

[11] Anon. (1572) 3 Leo. 16-17.

[12] Hynde's Case (1591) 4 Co. Rep. at f. 71a—the case applies only to a fine, but the reasoning would cover the case of a feoffment also, and the law is so stated in Second Instit. 671-672.

[13] The crucial words were "by reason *only* of any bargain and sale thereof."

ferred.[1] But, subject to this qualification, it was settled after a little hesitation[2] before the middle of the seventeenth century, that the enrolment related back to the bargain and sale;[3] so that "neither the death of the bargainor, nor of the bargainee before inrolment, shall hinder the passing of the estate. And that a release of a stranger to the bargainee before inrolment is good. So as it hold not by relation between the parties by fiction of law; but in point of state as well to them as to strangers also."[4]

The essence of the covenant to stand seised was "good" as distinct from "valuable" consideration; and good consideration was blood relationship or marriage.[5] It followed that it was only to those, who could be brought within the consideration by virtue of blood relationship or marriage, that such a conveyance could be made; so that if, for instance, X, in consideration that B married his daughter, covenanted to stand seised to the use of B and his daughter, remainder to C, the remainder to C was void, "for that he is a stranger to the consideration."[6] As in the case of the bargain and sale, the consideration need not be expressed in the conveyance, but could be averred and proved;[7] and a conveyance might be construed as a covenant to stand seised, if such a construction was needed to give effect to the intention of the parties thereto.[8] The question whether this construction could be put upon a deed might be important when there was no enrolment. In such a case the rule was that, if the conveyance was expressed to be in consideration, both of money and of love and natural affection or of marriage, it operated as a covenant to stand seised, so that no enrolment was needed;[9] but that if it was in fact in consideration of love and natural affection, but expressed to be for money only, it could only take effect as a bargain and sale, and enrolment was necessary.[10]

(iii) Both the bargain and sale enrolled and the covenant to stand seised suffered from several defects. The publicity of the bargain and sale, which was secured by the enrolment, rendered it distasteful to the landowners; but this was perhaps the least of its defects. By reason of the fact that the bargainee was a cestuique

[1] "Both by reason of this word *only* etc., and that the estate by common law vested shall be preferred," Second Instit. 672.

[2] See Bellingham v. Alsop (1605) Cro. Jac. 52; cp. Flower v. Baldwin (1632) Cro. Car. at p. 218 *per* Jones, J.

[3] Dymmock's Case (1617) Cro. Jac. 408; Flower v. Baldwin (1632) Cro. Car. at p. 218 *per* Croke, J.; Parker v. Bleeke (1640) Cro. Car. at p. 569; Co. Litt. 186a; Sanders, Uses ii 65-67.

[4] Second Instit. 674-675.

[5] Vol. iv 425-427.

[6] 2 Rolle, Ab. 784 pl. 5; cp. Sanders, Uses ii 99.

[7] Bedell's Case (1608) 7 Co. Rep. 40a.

[8] Lade v. Baker (1690) 2 Ventr. 149.

[9] Calthrop's Case (1575) Moore at p. 102.

[10] Bedell's Case (1608) 7 Co. Rep. at f. 40b.

use, no use could be limited on his estate;[1] so that neither a springing use nor a power to lease, which would be executed by the statute of Uses, could be limited on a bargain and sale in fee; and, even in the case of a bargain and sale for life, it seems to have been thought that a power to lease could not be given to the bargainee, which would take effect out of the seisin of the bargainor,[2] perhaps because the appointee was wholly outside the consideration which gave effect to the original bargain and sale.[3] The covenant to stand seised avoided the defect of publicity; but it suffered from even more fatal defects than the bargain and sale. We have seen that by it a conveyance could only be made to those who came within the consideration of blood relationship or marriage. Hence no power to lease could be reserved on such a conveyance;[4] and, what was worse, no limitation to trustees to preserve contingent remainders could be made.[5] For these reasons, therefore, these conveyances, in the course of the seventeenth century, gradually gave place to a form of conveyance which avoided these defects—the bargain and sale for a term coupled with a release.

(2) *The bargain and sale for a term coupled with a release.*

We have seen that at common law a lease for a term, followed by a release, was a recognized mode of conveyance; but that this conveyance could not take effect until the lessee had entered under the lease.[6] The effect of the statute of Uses was to dispense with the necessity for entry under the lease; for the bargain and sale created the situation of a vendor seised to the use of the purchaser for a term, and the statute converted the use into actual possession, without any need for an entry by the purchaser. This being the case, it is clear that such a purchaser could take a release from the lessor, and so acquire the freehold without entry. Thus a bargain and sale for a term which, by virtue of the statute of Uses, conveyed the actual possession without entry, coupled with a release which operated at common law, could pass the freehold, without livery of seisin and without the need for enrolment. It was the established tradition of the seventeenth century

[1] Vol. iv 469-470; Dillon v. Fraine (1589-1595) Popham at p. 76; Sanders, Uses ii 62.

[2] Dillon v. Fraine (1589-1595) Popham at p. 81; cp. Perrot's Case (1595) Moore at p. 373.

[3] Sanders, Uses ii 62.

[4] Mildmay's Case (1582-1584) 1 Co. Rep. at f. 176b; Perrot's Case (1595) Moore at p. 373; Cross v. Faustenditch (1605) Cro. Jac. 180.

[5] Sanders, Uses ii 100—"this is a principal reason why covenants to stand seised are fallen into disuse."

[6] Vol. iii 232, 249.

that this device was invented by Sir Francis Moore[1] (1558-1621) —a member of St. John's College, Oxford, and a distinguished lawyer and member of Parliament, best known from the authorship of the reports which bear his name, and his reading on Charitable Uses.[2] It is probable that this tradition is correct for the two following reasons: In the first place, it was not till 1621 that the efficacy of this mode of conveyance was recognized by the courts in the case of *Lutwich v. Mitton;*[3] and this ruling was accepted as established law in 1629.[4] In the second place, we do not find any precedent for this mode of conveyance in the edition of West's Symboleography published in 1615. This would seem to show that, at that date the device was new, and that its validity was not completely established. There is, in fact, evidence that Noy refused to regard it as valid, holding that an actual entry by the lessee was in all cases necessary. Noy's view was based on the old rule that, if a conveyance could operate either at common law or by virtue of the statute of Uses, it must be taken to operate at common law.[5] He seems to have been of opinion that, even an express statement that the lease was intended to operate in such a way that, by the statute of Uses, the lessee should be capable of taking a release, was insufficient to dispense with an actual entry by the lessee.[6] But his opinion was not followed; and in leases of this kind this statement was always made.[7] The validity of this mode of conveyance was assumed by Bridgman;[8] and it is clear that, during the latter part of the seventeenth century, it was rapidly becoming the ordinary form of conveyance. The only important instance in which it could not be used was in the case of a conveyance by a corporation. Since a corporation could not be seised to a use,[9] it could not take advantage of these new methods of conveyance, and was obliged, till 1845, to convey by the old method of feoffment and livery of seisin.[10]

We have seen that this mode of conveyance obviated the disadvantage of publicity which was inherent in the bargain and

[1] Barker v. Keat (1677) 2 Mod. at p. 252 *per* North, C.J.; North's judgment is the best account of the history of this matter.

[2] Dict. Nat. Biog.; see vol. v 362, 395.

[3] Cro. Jac. 604; the principle upon which the decision is based had been laid down in Heyward's Case (1595) 2 Co. Rep. at f. 36a, in which it was resolved that, "if this interest should take effect by bargain and sale, then an attornment is not necessary; for the statute of 27 H. 8 cap. 10 of Uses doth execute possession to it. And the statute of 27 H. 8 cap. 16 of Enrolments doth not extend to it, because no estate of freehold passes, but only an estate for years."

[4] Iseham v. Morrice (1629) Cro. Car. at p. 110.

[5] Barker v. Keat (1677) 2 Mod. at p. 252.

[6] Ibid.

[7] Bl. Comm. ii App. II. § 1.

[8] Geary v. Bearcroft (1666) Carter at p. 66.

[9] Vol. iv 427-428.

[10] Sanders, Uses ii 27-28; Williams, Real Property (22nd ed.) 309.

sale enrolled. It also obviated the other disadvantages, both of the bargain and sale enrolled, and of the covenant to stand seised. The release operated at common law. It was a conveyance which took effect by way of "transmutation of possession."[1] Therefore uses could be limited on the seisin so conveyed, and powers of appointment could be given, which could take effect out of the releasee's seisin, and so convey the legal estate to the appointee. It is not surprising, therefore, that it became the ordinary mode, not only of conveying corporeal hereditaments, but also of conveying or creating certain classes of incorporeal hereditaments,[2] and of effecting such transactions as exchanges or partitions.[3] In this way the law acquired a general form of conveyance for interests in land other than copyholds, which could, as we shall see,[4] be used for very various purposes. But, before I deal with the purposes for which it could be used, I must first say something of the devise, which, as a result of the statutes of Wills, had been introduced into the common law, and had come to be regarded as a new species of the large genus conveyance.

The Devise

The will of estates of inheritance in land, held by free and copyhold tenure, has had a curious history. These wills, like the will of personalty, have always had two of the characteristics of a will, in that they were secret and took effect only at death.[5] But, unlike the will of personalty, they retained, till 1837,[6] one of the characteristics of a conveyance, in that only that property which the testator had at the time of the making of the will could pass by them. Moreover, they differed from the will of personalty in that they fell, from the date of Henry VIII.'s first statute of Wills,[7] under the jurisdiction of the common law courts. Because they were wills of land, the ecclesiastical courts never had anything to do with them; and we shall see that the fact that they thus fell within the jurisdiction of the common law courts was one of the chief reasons why they so long retained this characteristic of a conveyance.[8] In the first place, therefore, I shall say something of the nature of these wills.

In the second place, I shall deal with the history of the forms required for the making and the revocation of these wills. We have seen that the modern power to devise freehold is of statutory origin. From the first, the Legislature prescribed forms for the

[1] Sanders, Uses ii 76. [2] Ibid 32-33, 38.
[3] Ibid 84. [4] Below 374-380.
[5] "The tenements cannot be devised until after the death of the ancestor," the Eyre of Kent (S.S.) 42 *per* Spigurnel, J. speaking of land devisable by custom.
[6] 1 Victoria c. 26. [7] 32 Henry VIII. c. 1. [8] Below 363-366.

making of a will of freehold lands; but it was not till later, and then only partially, that it prescribed any forms for the making of a will of personalty; and till 1837 it prescribed no forms for the making of a will of copyhold. It was not till the passing of the statute of Frauds[1] (1677) that any forms were prescribed for the revocation of wills of land; and we shall see that its provisions applied only to freehold. Thus, as we shall see, the history of the forms required for the making and revocation of a will of land is almost as curious as the history of the nature of these wills.

In the third place, I shall illustrate, from wills of the sixteenth and early seventeenth centuries, the manner in which testators used their powers of devising their land. These wills throw a flood of light on the reasons why the power of willing lands was so much desired by landowners. We shall see also that some of the clauses inserted in these wills resemble those found a little later in settlements of land; and that it is probable that these two classes of assurance have exercised a reciprocal influence on one another.

(1) *The nature of a devise.*

In considering the history of the law as to the nature of a devise we must deal separately with freehold and copyhold; for, although the results reached were not dissimilar, the route by which they were reached was different.

Freehold.

We have seen that both in Anglo-Saxon law, and in the days of Bracton, a will of land was regarded as a species of conveyance.[2] This primitive conception has had an extraordinarily long life in English law, because of the decision arrived at at the end of the thirteenth century not to permit the will of land.[3] If such a will had been recognized, it is difficult to suppose that its nature would not have been affected by the parallel will of personalty, which, being regulated in the ecclesiastical courts where the influence of Roman law was stronger, soon became a true will—ambulatory, as well as secret and revocable. But we have seen that, in consequence of the prohibition of the will of land, landowners lost the power to devise their land directly; and that they only regained it indirectly by means of a feoffment to uses.[4] Except in those towns in which a custom to devise was recognized,[5] the will of land was simply a direction to the feoffees to uses as to the disposition of the cestuique use's property after his death. It

[1] 29 Charles II. c. 3 § 6; vol. vi 385.
[2] Vol. ii 95-96; vol. iii 102.
[3] Ibid 75-76.
[4] Vol. iv 438-439.
[5] Vol. iii 271.

differed neither formally nor materially from any other directions which he might give to his feoffees. Naturally, therefore, it was an instrument which had quite as many of the characteristics of a conveyance as of a will.

This fact comes out very strongly in the wills of land which were made before Henry VIII.'s statute of Wills. No doubt in some cases, both before and after this statute, lands were devised directly much as personalty was bequeathed.[1] But, in many cases, the devise takes the form of a direction to the feoffees as to the disposal of the testator's property;[2] and testators show that they recognize that the making of a will of land is a transaction of a different nature to the making of a will of personalty. It is often a separate document or documents in which the feoffments are set out, and the directions to the feoffees are given.[3] If it is not a separate document, it is contained in a separate part of the will.[4] Often it is obviously a supplementary document—supplementary to the directions already given to the feoffees—which is directed either to the confirmation,[5] or variation,[6] or completion[7] of a settlement already made. In these wills the testator deals only with lands of which he has already enfeoffed others. He does not attempt to deal with lands which he may afterwards acquire. Such an attempt would obviously be a legal impossibility; for we have seen that it was settled law that a man "could not limit a use out of land which he hath not."[8]

When the Wills Act was passed in 1540,[9] the idea that a will of lands should take the form of a series of directions to feoffees was already ancient and deeply rooted in the minds of landowners. The aim of the Act was to restore partially that power of testation which the statute of Uses had taken away;[10] and the width of the clause which conferred the power of testa-

[1] Vol. iv 422; see e.g. North Country Wills (Surt. Soc.) i 62 (1491), 211 (1550-1551), 224 (1553)—the will of Lyster, C.J.

[2] Vol. iv 422-423; see e.g. North Country Wills (Surt. Soc.) i 36 (1432); Test. Ebor. (Surt. Soc.) v 67 (1515), 116 (1520), 122 (1520), 184 (1524), 246 (1527-1528).

[3] Wills from Doctors Commons (C.S.) 59—the will of Sir Thomas Gresham (1575); Test. Ebor. (Surt. Soc.) v 170 (1523), 310 (1531)—an elaborate will made by Sir W. Bulmer in the form of an indenture, in which various feoffments of different dates are set out; cp. vol. iv 422.

[4] Wills from Doctors Commons (C.S.) 34 (1545); North Country Wills (Surt. Soc.) i 107-108 (1521), 184-189 (1542); Wills and Inventories (Surt. Soc.) ii 18 (1579); see vol. iv App. II.

[5] Wills from Doctors Commons (C.S.) 133-134 (1679), 138 (1680); North Country Wills (Surt. Soc.) i 188-189 (1542); Test. Ebor. (Surt. Soc.) v 30 (1518), 152 (1522), 195 (1524).

[6] Ibid 59-60 (1514-1515), 64 (1515); North Country Wills (Surt. Soc.) i 128 (1531); ii 128-129 (1587), 143 (1589)—will of Christopher Wray, C.J.

[7] Wills from Doctors Commons (C.S.) 100 (1636)—Will of John Hampden; North Country Wills (Surt. Soc.) i 201 (1548).

[8] Cro. Eliza. at p. 402; above 362.

[9] 32 Henry VIII. c. 1.

[10] Vol. iv 465-467.

tion did, in fact, give to testators all, and more than all, the freedom to mould the disposition of their lands, which they had formerly enjoyed through the machinery of the flexible use. It was only natural, therefore, that the lawyers and landowners alike should have come to the conclusion that the will of lands, made by virtue of the Act, was a transaction of a kind essentially similar to a will of lands made through the machinery of the use. Like it, it did not take effect till death ;[1] and, like it, it was essentially a conveyance of the whole or part of the estate belonging to the testator when it was made.[2] "As all real property lawyers know," said Jessel, M.R., in *Sugden v. Lord St. Leonards*,[3] "in ancient times it was customary for great landed proprietors to make not only separate wills of real and personal estate, but several wills of real estate. I have seen as many as three ancient wills of different portions of the real estate of the testator, devoting an estate to different purposes. . . . If the testator intended to found two families, he was often desirous that this will should accompany the muniments of title to his estate, and, therefore, he made separate wills."

It followed that, as under the older law, the only land, which could pass by such a will, was the land of which the testator had been seised both at the time of the making of his will and of his death. Coke, indeed, said that the reason of this rule was to be found in the words of the Act which required the testator to "have" the land, which "word 'having' imports two things, *scil.* ownership and time of ownership, for he ought to have the land at the time of the making of the will."[4] But I think that it is probable that Coke could never have put such an interpretation on the statute of Wills, if it had not represented the current view as to the nature of such a will; and that Lord Trevor, C.J.,[5] and Lord Mansfield[6] were right in ascribing the existence of this

[1] "When a man makes a feoffment to the use of his last will he has the use in the meantime," Clere's Case (1600) 6 Co. Rep. at f. 18a; for a similar rule as to copyholds see below 367.

[2] Above 364 nn. 3-7.

[3] (1876) 1 P.D. at p. 237.

[4] Butler and Baker's Case (1591) 3 Co. Rep. at f. 30b; cp. also Lorrie's Case (1614) 10 Co. Rep. at f. 83b.

[5] "There is yet a further reason why wills should receive such construction as conveyances by way of use, and why they should imitate such conveyances, because it appears the Act of Parliament of wills was made to supply the power of declaring uses by men's last wills and testaments, which they had before the 27 H. 8 . . . therefore there is a great deal of reason why a will should receive the same construction," Arthur v. Bockenham Fitz-Gibbon at p. 238.

[6] "A devise in England is an appointment of particular lands to a particular devisee; and is considered in the nature of a conveyance by way of appointment; and upon that principle it is that no man can devise lands which he has not at the date of such conveyance. It does not turn upon the construction of the stat. 32 H. 8 c. 1, which says that 'any person having lands etc. may devise.' For the same rule held before the statute where lands were devisable by custom," Harwood v. Goodright (1774) 1 Cowper at p. 90; Holt, C.J., also agreed that the rule did not depend upon the wording of 32 Henry VIII. c. 1, Broncker v. Coke (1708) Holt at p. 248.

view to the fact that these wills of land, before the passing of the statute of Uses, were necessarily made by means of a feoffment to uses.

The consequences of this rule were followed out with the ruthless logic which was characteristic of the lawyers of the sixteenth, seventeenth, and eighteenth centuries. Because a will was a conveyance of the land which the testator then had, and of that land only, it was necessary for him "to republish his will or to make a new one as often as he acquired other property."[1] If he disposed of his property, and reacquired it before his death, the same result followed. In fact, any alteration of his estate, even if made for merely technical purposes, had this result. Thus, "a feoffment or any other conveyance to the use of himself, or where the use results to him, or a fine or recovery to strengthen his title, or even made expressly to give effect to his will, operated as a revocation of it"; and the same result followed if he mortgaged his estate, and, on payment of the debt, it was reconveyed to him.[2] Again, each devise in a will was regarded as a specific devise of the particular land to the devisee. Even a residuary devise was so regarded; so that if a specific devise failed, the heir, and not residuary devisee, was entitled to the property which had thus failed to pass.[3] These doctrines gave rise to some very intricate rules of law, and frequently disappointed the intentions of testators.[4] They have been swept away by §§ 24 and 25 of the Wills Act 1837.[5] The only remaining effect of these consequences of the old view as to the nature of a devise of freehold is the rule, which rests upon an absurdly restrictive view of the effect of § 24 of the Wills Act, that all devises—even residuary devises—are specific.[6]

Copyhold.

Land held by copyhold tenure did not fall within the provisions of Henry VIII.'s statutes of Wills; but, by a custom which, when Coke was writing, had become very general,[7] though not quite

[1] Real Property Commission, Fourth Rep. 24. [2] Ibid 27.

[3] Wright v. Horne (1725) 8 Mod. 221.

[4] As Lord Mansfield truly said in Harwood v. Goodright (1774) 1 Cowper at p. 90, "It is upon the same principle, but carried too far by subtlety, that there have been revocations determined contrary to the intent of the testator; as when he has afterwards made a feoffment or the like"; and it is clear that Holt struggled against the rule for this reason, Broncker v. Coke (1708) Holt at p. 246, though he found it too well established to be upset, ibid at p. 248; cp. Real Property Commission, Fourth Rep. 24.

[5] 1 Victoria c. 26.

[6] Hensman v. Fryer (1867) L.R. 3 Ch. App. at pp. 424-426 *per* Lord Chelmsford; Lancefield v. Iggulden (1874) L.R. 10 Ch. App. at pp. 140-142.

[7] See Co. Litt. 59b; Fitch v. Stuckley (1594) 4 Co. Rep. 23a; Real Property Commission, Fourth Rep. 10.

universal,[1] a copyholder could make a surrender to the use of his will, which would entitle the devisee, on the death of the testator, to admittance. A will made after this fashion was even more clearly a conveyance than a will of freehold; for though on such a surrender, the surrenderor still had the fee, so that he could dispose of the property as he pleased,[2] the property passed by virtue of the surrender and not by virtue of the will.[3] Hence, just as in the case of freehold, the will could only pass the property which the testator had at the time when it was made;[4] and though, as we shall see, the necessity for a surrender was dispensed with by a statute of 1815,[5] it was the better opinion[6] that, till 1837, it was only those copyholds which the testator had at the date of the will which passed by it.

This was the general law as to devises of copyhold. But, as is generally the case with copyholds, there were divergent customs. In some manors there was a custom to devise directly,[7] and in others no devise by means of a surrender to the use of a will was possible.[8] This total prohibition of devise seems to have been more especially common in the case of certain customary freeholds; and, to get indirectly the power to devise, such tenants were reduced to employ the machinery of a conveyance inter vivos coupled with a trust, or of a collusive mortgage.[9]

(2) *The forms required for the making and revocation of wills.*

Freehold.

Henry VIII.'s statutes[10] required the will to be in writing; but they did not require the will to be written by the testator or signed by him. It was held, as early as 1553, that instructions for a will, given verbally by the testator to another person, and written out by that person, even though they were not read over to the testator, were a sufficient compliance with the statutes.[11]

[1] Real Property Commission, Fourth Rep. 10; in Pike v. White (1791) 3 Bro. C.C. at p. 288 Lord Thurlow is reported to have ruled that a custom denying the right to surrender to the use of a will was bad; but the authority of the report on this matter is doubtful; and there seems to be no doubt that such a custom is good, see notes to the report.

[2] Fitch v. Hockley (1595) Cro. Eliza. 442; S.C. (1594) 4 Co. Rep. 23a.

[3] Murrel v. Smith (1592) 4 Co. Rep. at f. 24b; Semaine's Case (1613) 1 Bustr. 200; Real Property Commission, Fourth Rep. 10.

[4] Ibid 24; though, as it is there pointed out the property could "be surrendered to the use of a prior will, in which case the surrender amounts to a republication of the will, and makes it speak as from the date of the surrender."

[5] 55 George III. c. 192; below 369.

[6] Real Property Commission, Third Rep. 21, Fourth Rep. 24.

[7] Ibid, Fourth Rep. 10. [8] Above n. 1.

[9] Real Property Commission, Third Rep. 21, 22.

[10] 32 Henry VIII. c. 1; 34, 35 Henry VIII. c. 5; Brett v. Rigden (1568) Plowden at p. 345.

[11] Brown v. Sackville (1553) Dyer 72a.

This case was followed;[1] and in 1666[2] a will was upheld which was written on loose sheets of paper, dictated by the testator to an attorney, though the testator had said that, as he intended to write them over again, he would not sign or publish them, but that in the meantime they should be his will. This case is said to have helped to give rise to the clause of the statute of Frauds, which required all devises of lands and tenements to be in writing and signed by the testator, or by some one else in his presence and by his direction, and to be attested in the presence of the testator by three or four credible witnesses.[3] This clause of the statute of Frauds, like its other clauses, gave rise to a good deal of litigation. It was not found to have worked wholly satisfactorily in practice, partly because "the desire of the courts to give effect to fair wills induced them to construe its provisions very liberally, and in some degree to evade them."[4]

No forms were prescribed for the revocation of wills before the statute of Frauds. That such wills were revocable had, as we have seen, been admitted from the earliest times.[5] It was also well settled that acts of total or partial destruction raised a presumption of an intention to revoke or alter a will; and that a revocation might be implied from a later disposition of his property by a testator, or from certain alterations in his personal circumstances, e.g. by marriage in the case of a woman, or by marriage and the birth of a child in the case of a man.[6] The statute of Frauds required that an express revocation must be effected by some other will or codicil in writing, or by some other writing of the testator signed in the presence of three or four witnesses.[7]

Copyhold.

Neither the Henry VIII.'s statutes of Wills nor the statute of Frauds applied to copyholds. As the former statutes refer only to lands held by knight service or socage tenure, it was reasonably clear that they could not be extended to land held by copyhold tenure. But, as the words of the statute of Frauds were wide enough to extend to copyholds, there was no very good reason why that statute was held not to apply to them.[8] It is true that a testator might, when he made his surrender to the use of his will, prescribe the formalities with which the will should be drawn up,[9] just as a person creating a power of appointment might pre-

[1] Real Property Commission, Fourth Rep. 26, communication of Samuel Gale, and the cases there cited.
[2] Stephens v. Gerard 2 Keble 128.
[3] 29 Charles II. c. 3 § 5; vol. vi 385.
[4] Real Property Commission, Fourth Rep. 15.
[5] Above 362.
[6] Vol. iii 540; Real Property Commission, Fourth Rep. 25-29.
[7] 29 Charles II. c. 3 § 6.
[8] Real Property Commission, Fourth Rep. 11.
[9] Godwin v. Kilsha (1769) Amb. 684.

scribe the formalities with which the power was to be exercised;[1] but, if no formalities were thus imposed, the will might be "made by any unsigned, informal, and in some cases imperfect writing," and even by parol, if the custom of the manor permitted.[2] The surrender to the use of the will was the one formality required till this was rendered unnecessary by a statute passed in 1815;[3] and a surrender was never necessary in the case of equitable estates.[4] No forms were prescribed for the revocation of a will of copyholds, so that it could be revoked merely by parol.[5]

Thus the rules with respect to the forms required for the making and revocation of wills of land, differed according to the nature of the tenure of and estate in the land. There were differences according as the land was freehold, or copyhold, or customary freehold; and there were differences according as the estate in it was legal or equitable. There were other differences according as the property was real and personal, and according as the will was or was not made in the exercise of a power of appointment. For the bequest of some kinds of property, e.g. money in the public funds, and for certain acts, e.g. the appointment of a guardian, a particular form was prescribed by statute. It is not surprising, therefore, that the Real Property Commissioners found that there were "ten different laws regulating the execution of wills under different circumstances."[6] This monstrous state of the law[7] was remedied by the Wills Act of 1837,[8] which was based largely on the recommendations of the Commissioners. Taking a very broad view of the effect of that Act it may be said that, in respect to the nature of a will, the model of a will of personal estate has been followed; and that, in respect to the forms required for the making and revocation of a will, the model of a will of freeholds has suggested some of the provisions of the modern law.

(3) *The contents of wills of the sixteenth and early seventeenth centuries.*

If we consider the difficult questions to which the rules as to the nature of a devise, and as to its making and revocation, gave rise; and if we consider the manner in which equity complicated the law, by attempting in certain cases to give some relief from the hardship arising out of these rules;[9] we shall not be surprised

[1] Above 306 n. 4.
[2] Real Property Commission, Fourth Rep. 11.
[3] 55 George III. c. 192.
[4] Car v. Ellison (1744) 3 Atk. at p. 75; Real Property Commission, Fourth Rep. 11.
[5] Ibid 30.
[6] Ibid 12, 13.
[7] See ibid 13 for some of the hardships occasioned by this state of the law.
[8] 1 Victoria c. 26.
[9] E.g. the complication of the rules arising out of the equitable doctrine of conversion, Real Property Commission, Fourth Rep. 14; and rules as to when a surrender to the use of a will of copyholds would be implied, ibid 10.

to find that, when Coke wrote at the end of the sixteenth century,[1] when Hale wrote in the latter part of the seventeenth century,[2] and when the Real Property Commissioners made their Fourth Report in 1833, questions relating to wills were the cause of "a large proportion of the doubts and difficulties which arose upon titles, and were the most frequent sources of litigation respecting real property."[3] We shall now see that the amount of this litigation was increased by the fact that the wide powers of disposition by will, sanctioned by Henry VIII.'s statutes, were extensively used; and used in many cases by amateurs, who were both ignorant of the provisions of the law which governed these wills, and incapable of expressing their wishes in clear terms. No doubt in many cases the difficulty was aggravated by the uncertainty of the law.[4] The rule against perpetuities, and many other rules applicable to executory devises, were, as we have seen, in an experimental stage in the sixteenth and seventeenth centuries. Even in the case of well drawn wills many difficulties arose from this cause; and it was only gradually that the law on these and many other points was settled at the expense of many estates. We shall, I think, get the clearest idea of the manner in which the wishes of testators shaped the contents of these wills, and the manner in which, conversely, the growing certainty of the law helped to determine the kind of dispositions which testators made, if we glance at some of the clauses in the wills of this period.

Both in the Middle Ages and in the sixteenth century testators were charitable;[5] and they often used their power of devise to give or charge their land for charitable purposes. We have seen that it was possible to give by will all sorts of directions

[1] "But now since Littleton wrote by the statutes of 32 and 34 H. 8 lands and tenements are generally devisable by the last will in writing of the tenant in fee simple . . . whereupon many difficult questions, and most commonly disherison of heirs (when the devisors are pinched by the messengers of death) do arise and happen," Co. Litt. 111b.

[2] "Since the statute of Wills, more questions, not only of law touching the construction of wills, but also of fact, arise, than in any other five general titles or concerns of lands besides," Treatise on Enrolling and Registering Conveyances, Somers' Tracts, Scott's Ed. xi 90; (ed. 1748) iv 243; as to Hale's authorship of this tract see vol. vi 594.

[3] Fourth Rep. 3; Mr. Tyrrell, in his evidence to the Real Property Commission, stated that "at least half the questions respecting real property arise upon wills," First Rep. App. 564 n.

[4] In several cases testators were obviously uncertain to what extent their dispositions were valid, see the instances collected by Gale, Real Property Commission, Fourth Rep. 29; North Country Wills (Surt. Soc.) i 219 (1552), 243 (1557); in the last cited case the testator directed that "if any thinge geven be not according to the lawes of this realme, then I will it be mended by twoo indifferent lawyers, utter barristers in the courte, that is to say, Sergeaunt Catlyn and Sergeaunte Prideux, Sr Anthony Nevill, knight, Mr. Estoft, Mr. Garrard, and Mr. Carrowe, or any twoo of them, and they to mende it, and to have either of them xx s."

[5] Vol. iii 546; vol. iv 439.

to executors or feoffees as to the mode of the user of the testator's property, and to impose all sorts of conditions upon his devisees.[1] We have seen, too, that the power to devise enabled a testator to make a better provision for the payment of his debts, and both to provide for the descent of his property to his first and other sons in tail, and, at the same time, to provide for his widow, younger children, and other dependents.[2] Let us look at a few instances of the manner in which these various objects were carried out.

We have seen that, right down to the period of the Reformation, directions to found chantries were frequent.[3] Towards the latter part of the century, we get the foundation of charities of a different type, some of which are still in existence. Thus, in 1568, William Ackerode, rector of Marston, directed his feoffees to hold his property in trust to maintain a scholar at Oxford or Cambridge "usque ad finem mundi."[4] This trust, we are told, is still running, though in an altered form. The estate produces a large sum which is used to maintain several scholars at the University, and for other educational purposes.[5] Another trust, which is still in existence, was founded by the will of Henry Smith in 1598.[6] He left his leases of coal mines to the city of Durham, "that some good traide may be devised for the setteinge of youth, and other idle persons, to worke, as shalbe thought moste conveniente, whereby some profitt may rise to the benefitte of this cittie, and relief of those that are past worke, and have lived honestlie upon their traide."[7] These are but two illustrations of these charitable bequests out of very many.[8] Their number shows that the legislation of Elizabeth[9] upon this matter was urgently needed.

Many various directions were given by testators as to the disposal of their property. Thus we have directions to invest money in the purchase of land,[10] to sell land, and dispose of the proceeds in various ways—e.g. for charitable purposes,[11] or to

[1] Vol. iv 438-440. [2] Ibid 438-439. [3] Vol. iii 545-546.
[4] Test. Ebor. (Surt. Soc.) v 96-97. [5] Ibid n.
[6] Wills and Inventories (Surt. Soc.) ii 331.
[7] Ibid 333; we are told, ibid 331 n. that this property, "much detrimented by bad management and ruinous speculations in former days, still affords, for the very useful purposes of the trust, a considerable yearly income, which is managed by the mayor and Aldermen under the name of 'Smith's Charity.'"
[8] For the charitable bequests left by Sir Thomas Gresham see his will in Wills from Doctors Commons (C.S.) 59 seqq. (1575); for other instances see Test. Ebor. (Surt. Soc.) v 226 (1527), 242 (1527), 281 (1530); North Country Wills (Surt. Soc.) ii 18-21 (1559); Wills and Inventories (Surt. Soc.) ii 90 seqq. (1582)—will of Bernard Gilpin.
[9] Vol. iv 398-399.
[10] Wills from Doctors Commons (C.S.) 135 (1679); North Country Wills (Surt. Soc.) ii 191 (1601).
[11] North Country Wills (Surt. Soc.) i 21 (1419), 53-54 (1466).

raise money for portions,[1] or to purchase the wardship of the testator's son.[2] Similarly, many different conditions were imposed on devisees. In 1417 a testator directed his feoffees to make an estate to his brother, provided that he paid twenty marks to his executors for the purpose of carrying out his will.[3] In 1481 a devise to a wife is made conditional on her releasing her claims to dower.[4] In 1552 a testator directs that his heir "shall have thorder of all the landes so long as he shall performe my will."[5] One of the most curious of these conditional devises is contained in a will of 1556.[6] One Robert Goche of Chilwell, Nottinghamshire, devised the residue of his lands to his son Barnabie when he attained the age of twenty-two. The son was to be sent to study law at the Inns of Court, "there to studye and applye his lerning in the lawe unto suche tyme as by his said lerning he attayne and come to be made Sergeaunte of the Coiff." When he was made serjeant, "I will my said sonne Barnabie, on my blessing that he never take penny or any manner of rewarde for his councell, but to give the same to all men without taking anny things, and specially those personnes that dwell in Lincolnshire, and if he do otherwise thenne I wille that he shall have no more of my manors and landes before to him geven, but only the mannour of Horkestowe, and that all the rest ymmediatlie after suche taking of monney for his counsell shall revert to my sonne Robert." One would suppose that such a condition hardly held out much inducement to the devisee to become a serjeant; and in fact no serjeant of that name appears in the list of serjeants in Elizabeth's reign. A devise, which almost seems to anticipate the modern plan of a discretionary trust, created in order to provide an inalienable provision for a family, was made by a testator in 1575.[7] "I will," says the testator, "that if my executors and my wif have good likeinge of the behavaiour of my sonne when he shall come to his full age, then my sonne shall enter into my landes and take the stocke to his own use, but if they shall perceave any untowardness or inclinacon to unthriftiness, then they shall enjoye the profittes till my sonne shall come to a more mature age, and duringe that tyme to employe the profittes for the sufficiente mayntenance of my sonne, and the residue to be bestowed amongeste the reste of my children, after which the whole stocke be given unto my said sonne."

This last mentioned devise brings us to what had always been one of the strongest reasons for the desire to gain the power to

[1] Wills from Doctors Commons (C.S.) 100-102 (1636)—will of John Hampden.
[2] Ibid 102-103. [3] North Country Wills (Surt. Soc.) i 15.
[4] Ibid 71. [5] Ibid 226-227. [6] Ibid 239-240.
[7] North Country Wills (Surt. Soc.) ii 75.

devise—the fact that it gave a testator the power to make adequate provision for the payment of his debts, and the needs of his family.[1]

The provisions made for the payment of the testator's debts took many forms. A very favourite form was to limit a term to the executors[2] or the feoffees,[3] or to give them a power to sell the land,[4] for this purpose. The device of limiting a term to the executors or feoffees was used, not only to enable them to pay debts, but also to enable them to pay legacies,[5] and to raise sums of money for the benefit of daughters.[6] Provisions were frequently made for giving estates to younger sons[7] or posthumous children,[8] or to the widow.[9] In these ways moral claims upon the testator could be satisfied, and the bulk of the lands could be settled upon his sons successively in tail. Such settlements were made in a very large number of cases;[10] but it is not till the latter part of the seventeenth century that settlements on the testator's sons for life, with remainders in tail, became usual.[11] Occasionally, also, we get a clause, which, as we have seen, is common in settlements of this period,[12] in which an attempt is made to restrain the right of the son to alienate.[13] In fact, many of the clauses in these wills are very similar to the clauses inserted in the marriage settlements of the period. They are so similar that it is possible that these devises may have had some share in the evolution of some of the provisions of the modern strict settlement, which was being gradually evolved in the seventeenth century. This we shall see more clearly in the following section, in which its growth, together with that of other leading types of conveyance of this period, will be examined.

[1] Vol. iv 438-439.

[2] Wills from Doctors Commons (C.S.) 36-37 (1545), 114 (1662); North Country Wills (Surt. Soc.) ii 16 (1559), 203 (1592); Test. Ebor. (Surt. Soc.) v 226 (1527).

[3] Wills and Inventories (Surt. Soc.) ii 3 (1563); sometimes the executors or feoffees were given, not a definite term, but an interest till the purposes of the trust were fulfilled, see e.g. Test. Ebor. (Surt. Soc.) v 9 (1509), 111 (1521), 209 (1525).

[4] Wills from Doctors Commons (C.S.) 95 (1631)—a power to sell New River Shares.

[5] North Country Wills (Surt. Soc.) ii 16 (1559).

[6] Ibid 109 (1583).

[7] Test. Ebor. (Surt. Soc.) v 47 (1513); Wills from Doctors Commons (C.S.) 96 (1631).

[8] North Country Wills (Surt. Soc.) i 219 (1552).

[9] Ibid; Test. Ebor. (Surt. Soc.) v 86-87 (1517-1518); Wills from Doctors Commons (C.S.) 96 (1631).

[10] See e.g. North Country Wills (Surt. Soc.) i 5 (1448), 153 (1466), 155 (1538), 231 (1553); Test. Ebor. (Surt. Soc.) v 23 (1510), 229 (1527).

[11] Wills from Doctors Commons (C.S.) 114-115 (1662), 150-151 (1689).

[12] Above 205-207; below 379.

[13] "With this proviso that he the said Roberte Claxton shall not alienate nor sell the said lordshipe but that the said landes shall lineallie descend to the heries maile of the said Roberte Claxton," Wills and Inventories (Surt. Soc.) ii 323 (1587).

The Leading Types of Conveyance and their Contents

In this section I propose to give a short account of some of the principal forms of conveyance and their contents under the following heads: conveyances to a purchaser in fee simple; mortgages; marriage settlements; conveyances of copyhold; and leases. I shall then say a few words of the manner in which the conveyancers made use of mediæval as well as modern forms of conveyance, and of the mediæval as well as the modern rules of the land law, to carry out the wishes of their clients.

(1) *The principle forms of conveyance.*

Conveyances to a purchaser in fee simple.

In the latter part of the sixteenth, and the earlier part of the seventeenth century, these conveyances were often made by bargain and sale enrolled;[1] and in the latter part of the seventeenth century the conveyance by bargain and sale and release became more usual.[2] But other forms of conveyances were by no means obsolete. There are several precedents of deeds of feoffment in Bridgman's collection;[3] and a vendor will sometimes make use of a deed which is intended to operate as a release, and at the same time further secure the purchase by a covenant to levy a fine and suffer a recovery, the manner of doing which is often set out with great elaboration.[4] Though vendors might adopt one or more of several alternative methods to convey securely the property to the purchaser, the actual contents of the deeds are beginning to approach the modern type. Such formal parts of the deed as the date, parties, recitals, the premises, and the habendum, had attained their modern form in the mediæval period.[5] In this period the number of general words used to describe the property granted tends to increase.[6] A clause of warranty is sometimes inserted;[7] but for this clause covenants for title have generally been substituted;[8] and during the sixteenth, seventeenth and eighteenth centuries the courts defined the extent of the liability imposed by them.[9] In some cases these covenants were expressly limited to the acts of the parties and their heirs, and it was

[1] For specimens see West, Symboleography (ed. 1615) §§ 394, 396.

[2] Bridgman, Conveyances (ed. 1690) 34 (bargain and sale for a year); ibid 293 (a release).

[3] Ibid 287, 319.

[4] Ibid 74, 75, 76; 322-324; see App. III pp. 558-559.

[5] Vol. iii 227-231.

[6] See e.g. West, op. cit. § 396; Bridgman, op. cit. 319.

[7] Ibid 74.

[8] Vol. iii 163.

[9] For a good account of the manner in which these covenants were interpreted by the courts during this period and later see Norton, A Teatise on Deeds 548-569; for the forms of these covenants in the early part of the seventeenth century see West, op. cit. §§ 66, 68, 71, 72, 77, 78; for their form in the latter part of the century see App. III pp. 557-559.

provided that "for the making acknowledging and executing of such further conveyances and assurances, or any of them, the persons that shall be required to make and execute the same be not compelled nor compellable to travel for the doing thereof above the space of twenty miles from the place of his her or their habitation or abode."[1] The conveyance generally contained a covenant to hand over the title deeds.[2] The consideration was recited in the deed and its receipt acknowledged.[3] It is clear that the practice of assigning terms on trust to attend the inheritance, in order to protect an intending purchaser from mesne incumbrances, was becoming general. There are two precedents in Bridgman's collection of the assignment for this purpose of a lease originally made to a mortgagee.[4] As we shall now see, the machinery of a lease was often employed for the purpose of a mortgage.

Mortgages.

We have seen that the ordinary form of a mortgage by a feoffment in fee, with a condition for reconveyance if the money was repaid by a fixed date, had been reached in the fifteenth century.[5] The books of precedents of this period contain forms of mortgage in this form.[6] But, as in the case of conveyances on a sale, the conveyance could also be made by a bargain and sale enrolled,[7] or by a bargain and sale for a term followed by a release;[8] and, similarly, the estate of the mortgagee was sometimes further secured by a fine or a recovery.[9] But all mortgages were not made in this form. An alternative was to demise the mortgaged premises to the mortgagee for a term of years, which demise was followed by a redemise from the mortgagee to the mortgagor at a fixed rent;[10] or the property was demised for a long term to the mortgagee, with a proviso that the mortgagor should have possession till he made default, and that, on payment, the demise should be void.[11]

The fact that the modern equitable rules as to mortgages were not as yet fixed comes out in these precedents. It is still necessary to covenant that the mortgagor shall have possession till default is made.[12] The equitable rules, which make the position

[1] Bridgman, Conveyances 290. [2] Ibid 288.
[3] Ibid 287. [4] Ibid 93, 284. [5] Vol. iii 129-130.
[6] West, op. cit. §§ 409, 411, 413. [7] Ibid §§ 418, 419.
[8] Bridgman, op. cit. 99; The Modern Conveyancer (ed. 1706) i 291-297.
[9] Bridgman, op. cit. 67, 245.
[10] Ibid 44-46, 46-48; 104-105, 106-109; the Modern Conveyancer (ed. 1706) i 324-331.
[11] Bridgman, op. cit. 34-39, 96-99; 279-283; The Modern Conveyancer (ed. 1706) i 311-313; 319-324.
[12] The Modern Conveyancer i 296; but this clause is more frequent in the mortgages by demise, Bridgman, op. cit. 36, 99, 281.

of the mortgagee in possession so uncomfortable that he will only take possession as a last resort, have not yet been elaborated. On the other hand, it is clear that equity will, after the estate of the mortgagee is absolute at law, give the mortgagor the right to come into equity to redeem.[1] It was to avoid this consequence that we get a declaration in a conveyance to a purchaser, which had given the vendor liberty to buy back the property at a fixed date, that "the said conveyances . . . were not nor are intended, nor shall be taken or construed to be in the nature of a mortgage or security for money in any wise, or to give any equitable right trust or liberty of redemption of the premises unto the said Lord P. (the vendor) or his heirs; neither shall the said J.W. (the purchaser) or his heirs or assigns be in any way accomptable unto the said Lord P. his heirs or assigns in case he or they shall make payment of the said sum of pounds at the day and place mentioned before."[2] That mortgages, in consequence of the equitable right to redeem, had come to be regarded in the light of permanent investments, is illustrated by precedents of the assignment of the mortgagee's interest on a change of the mortgagee.[3]

Marriage settlements.

It is clear from Bridgman's precedents that the scheme of the modern strict settlement had been in substance reached by the end of the seventeenth century. Before that period, both the machinery by which the purposes of such a settlement were attained, and its contents, were still in an experimental stage; and it was inevitable that this should be the case. We have seen that it was not till the middle of that century, that the bargain and sale for a term coupled with a release, was coming to be regarded as the usual form of conveyance;[4] and it was not till the end of the century that the rules against perpetuities,[5] and equitable rules as to the separate estate of the married woman, were approaching their modern form.[6] Hence, although we see, both in the wills and the conveyances of the sixteenth and earlier part of the seventeenth centuries, that the conveyancers are aiming at the results of modern strict settlement, they have not yet succeeded in producing anything quite like the modern scheme. It is clear from the published precedents in conveyancing of this period that the final evolution of that scheme was due largely to Bridgman himself, who, as we have seen, was both the first conveyancer of

[1] Vol. v 331-332; vol. vi 663-664.
[2] Bridgman, op. cit. 57; in West's collection also (§ 417) there is a precedent of a sale upon condition.
[3] Bridgman, op. cit. 60-63. [4] Above 361. [5] Above 223-226.
[6] Vol. v 312-315; vol. vi 644-646; below 379, 380.

his day,[1] and an important contributor to the settlement of the modern rule against perpetuities.[2] It is in fact his creation of the modern strict settlement which constitutes his chief claim to be called the "father of modern conveyancing."

We have seen that, in the mediæval period, it was possible by various devices, and by means of several different instruments, to construct a marriage settlement.[3] The statute of Uses had much increased the range of powers at the disposal of settlors, and had simplified the methods by which they were carried out. But, it would seem from the precedents in West's collection, that at least two instruments were employed to carry out the purposes of a settlement. There was, firstly, the covenants which stated the purposes of the settlement, and the uses to which the feoffees were to hold in order to carry out those purposes; and, secondly, there was the formal conveyance to the feoffees. It is in these covenants in which the uses were set out that we can see the scheme which commended itself to the settlors of the sixteenth and early seventeenth centuries. Let us examine one or two of these precedents given by West, and compare them with one or two of the precedents in Bridgman's collection.

A precedent in West's collection entitled "Covenants of Marriage" runs in substance as follows:[4] It is agreed between the parties to these presents in the form following:—B.T. (the father) agrees that his son and heir-apparent T.T. shall, at or before a fixed date, marry A.R. daughter of T.R. B.T., before a fixed date, is to make an estate of certain manors to feoffees and their heirs, in a manner approved of by T.R., to the following uses—to the use of B.T. and his heirs till the solemnization of the intended marriage; and from and after the said marriage, to the use of T.T. and A. during their two lives and the life of the longer liver; and after to the use of T.T. and the heirs male of his body by his wife A.; and for default of such issue to the use of B.T. and the heirs male of his body; and for default of such issue to the use of B.T. and his heirs. There is a covenant against incumbrances except in respect of the jointure or dower of B.T.'s wife, in respect of certain other estates, and in respect of chief rents, services, and other old rents due in respect of the lands. Then follow covenants for seisin, further assurance, and quiet enjoyment. It is agreed that another tenement shall be settled on B.T. for life; remainder to T.T. and the heirs male of his body by A; and in default of such issue to the heirs female of his body by A for so many years as there shall be several issues female living, if there are living more than one and under five; and if five or more are living to

[1] Above 112, 222; vol. vi 537-538, 604-605.
[2] Above 221-222. [3] Vol. iii 250-252. [4] Op. cit. § 87.

their use for four years after the deaths of B.T. and T.T.; and if one only is living to her use for two years. If no issue of T.T. and A. be living after the death of B.T. and T.T. then to the use of any posthumous daughter of T.T. and A. for two years if she lives so long. After the end of these terms of years limited to the female issue of T.T. and A., to the use of T.T. and the heirs male of his body; and, in default, to the next issue male of B.T. and the heirs male of his body; and, in default, to the next heir male of B.T. and the heirs male of his body; and, in default, to B.T. and his heirs for ever. Then comes a proviso that B.T. shall, during his life, be able to grant to L.T. a younger son, a rent charge of twenty marks issuing out of the settled lands with a clause of distress. This is followed by a covenant on the part of B.T. to assure by will or otherwise certain leaseholds to T.T. and his heirs male after his (B.T.'s) death; and it is provided that there is to be a further covenant by T.T. that he will assign the residue of these leaseholds after his death to the heirs male of his body. Lastly, there is a proviso that T.T. and A. and their children shall be maintained in B.T.'s house for twelve years after the solemnization of the marriage. The obligations of B.T. in this respect are set out in some detail; and it is provided that, in default, he shall pay them £40 a year. Then, it is suggested, should follow covenants as to jointure, etc., for the benefit of the intended wife.

In West's collection there are several other precedents of this kind, which vary in their details, and are adapted some to ante[1] and some to post nuptial[2] settlements. There are also different precedents for special clauses which it might be desired to insert in a settlement. Thus we get covenants to settle a jointure,[3] covenants to levy a fine or suffer a recovery to the uses of a settlement,[4] powers to vary the uses of a settlement,[5] powers to grant leases,[6] and powers to give annuities to younger sons or jointures to a wife.[7] It is, I think, clear from these precedents that the strict settlement of our modern law was taking shape—there is the fundamental idea that the bulk of the property shall descend to the eldest son and his issue in tail, and that the widow, daughters, and younger children shall have merely terminable interests in or charges on the property. But the modes by which these results are achieved have not as yet become stereotyped. They are marked by the same diversity as characterizes the ordinary conveyances of this period. We find that, as in the wills of this period,[8] it is quite as frequent to give an estate

[1] Op. cit. §§ 81, 82, 85, 88.
[2] Ibid §§ 84, 266.
[3] Ibid § 88.
[4] Ibid § 89 (wrongly numbered 88).
[5] Ibid §§ 272, 273, 274, 277, 279, 280.
[6] Ibid §§ 275, 282.
[7] Ibid § 276.
[8] Above, 373.

tail to the husband,[1] as to give the husband an estate for life with remainder in tail to his eldest unborn son;[2] and that, instead of limiting terms to secure portions or jointures, an estate is limited for a term to the beneficiary in order that, during that term, the money may be raised.[3]

In fact, as I have already pointed out,[4] it was impossible for these settlements to have as yet attained their final form, because the legal principles upon which the scheme of the modern strict settlement depends was not as yet settled. Thus the fact that the length of time within which property could be rendered inalienable was not settled; and the fact that settlors desired to create perpetuities, caused a clause, which aimed at restraining any alienation, or attempt to bar the estates tail which had been settled, to be a very usual clause.[5] As we have seen,[6] it was not till after the decision of *Corbet's*,[7] *Mildmay's*,[8] and *Mary Portington's Cases*,[9] that the futility of these clauses was definitely established. Again, we have seen that, at the end of the sixteenth and the beginning of the seventeenth centuries, attempts were being made to improve the proprietary capacity of a married woman. But we have seen that the law was as yet very uncertain; and that various experiments were being tried to effect this object.[10] These experiments are reflected in the conveyancing precedents. Thus we get precedents of contracts between the husband and the friends of the wife,[11] or between the husband and wife,[12] that he will not alien the wife's property, that she shall have power to make a will of it, that she shall have a limited disposing power over it during her lifetime, that he will leave her so much of his property by will; and these contracts were sometimes secured by the execution of a bond conditioned to be void if they were fulfilled.[13] Similarly, there are precedents for the conveyance of property to trustees for the benefit of the wife. The trust is sometimes for the benefit of the husband and wife jointly, with a covenant by the husband that he will not alienate or in any way incumber the property;[14] and sometimes it is for the benefit of the wife solely. The last mentioned precedent is entitled, "a conveyance in trust by a widdow of a lease given unto her first husband, that her second husband should not sell it away, as commonly it happeneth."[15] It was the settlement of the law applicable to these and other points, during the latter half of

[1] West, op. cit. §§ 81, 85.
[2] Ibid §§ 84, 87.
[3] Ibid §§ 84, 87.
[4] Above 376.
[5] West, op. cit. §§ 84, 85, 91, 98, 99, 278, 281.
[6] Above 205-207.
[7] (1599-1600) 1 Co. Rep. 83b.
[8] (1606) 6 Co. Rep. 40a.
[9] (1614) 10 Co. Rep. 35b.
[10] Vol. v 310-314.
[11] West, op. cit. § 86.
[12] Ibid § 82.
[13] Ibid.
[14] Ibid § 285.
[15] Ibid § 286.

the seventeenth century, that made it possible for a great conveyancer like Bridgman to take a long step towards finally fixing the form and the contents of these settlements.

It is clear from Bridgman's precedents that, though in some cases a fine[1] or a recovery[2] was made use of to convey lands in strict settlement, it was much more usual to make use of a release founded upon a bargain and sale for a term.[3] It is clear, too, that its contents have reached almost their final form.[4] The clauses which aimed at restraining any alienation or attempt to bar the estates tail have disappeared. The property is settled on the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons in tail; and the wife and daughters are provided for by charges on the estate, secured by limiting terms of years to trustees.[5] As in the earlier period, powers of leasing are given to the husband, and covenants for title are inserted. Sometimes there is a covenant to settle after acquired property.[6] A reference to the settlement from Bridgman's precedents set out in Appendix III., will show, both the great advance which had been made since the beginning of the century, and will illustrate the fact that Bridgman has in all essentials created the modern form of strict settlement.[7] It is clear, too, from other precedents in his collection that a trust for the separate use of the married woman, which gives her full control over the property, is well recognized.[8] On the other hand, there is no hint as yet of the restraint against anticipation. For this improvement we must wait till the chancellorship of Lord Thurlow in the eighteenth century.[9] There is, however, one precedent of a postnuptial settlement, in which an attempt is made to create a trust to pay an annuity to the husband, during the joint lives of himself and his wife, with a proviso that the husband shall not be able to alienate it before it becomes due, and that if it should become liable in law or equity to any debt or incumbrance created by the husband, it should cease, and be payable to the trustees for their own benefit.[10] This is clearly an attempt to anticipate the modern discretionary trust, which was probably not very effectual.

Conveyances of copyhold.

Copyholds must, as we have seen, be conveyed by surrender and admittance. But it is clear that they could be dealt with in

[1] Op. cit. 128. [2] Ibid 221. [3] Ibid 84, 196, 357.
[4] See the precedent from Bridgman's Conveyances 196 printed App. III.
[5] Bridgman, op. cit. 186-187. [6] Ibid 190.
[7] Cp. a later precedent said to have been drawn by Mr. Ewers in the Modern Conveyancer (ed. 1725) iii 133.
[8] Bridgman, op. cit. 118, 125, 136, 351.
[9] See L.Q.R. xl 221. [10] Bridgman, op. cit. 259-260.

much the same way as freeholds, by means of covenants, by which the obligations of the parties could be fixed, and the uses of the surrender declared.[1] Thus covenants for title, similar to those used in conveyances of freehold, were generally inserted;[2] and copyholds were mortgaged[3] and settled[4] in much the same way as freeholds.

Leases.

The precedents of conveyances of leases cover a wide ground, because the machinery of a lease was employed for many various purposes. Thus in West's collection we have precedents of leases of town property,[5] agricultural leases,[6] a lease of a manor or lordship,[7] of a brewhouse,[8] of a warren of conies,[9] of fish and fish ponds,[10] of a parsonage.[11] We have seen that lessors and lessees were very free to mould their respective rights and duties as they pleased.[12] But we gradually get a tendency to uniformity in certain types of leases. Thus in leases of houses there is generally a covenant as to keeping the property in a state of repair, and permitting the lessee to enter to view the state of repair.[13] In agricultural leases there are sometimes covenants as to the mode of cultivation;[14] and sometimes in these leases the rent reserved is not only the payment of a sum of money, but also the render of commodities,[15] and even personal services.[16] There is sometimes a covenant that the lessee will not assign;[17] and in one case it is provided that he shall not consent to the inclosure of any of the common fields without the assent of the lessor.[18] One precedent provides that the lessee shall pay all parish rates;[19] and another, that the rent shall be payable "without any deduction defalcation or abatement for or in respect of any taxes charges or

[1] See West, op. cit. § 401; Bridgman, op. cit. 31-33. [2] Ibid 117.
[3] Ibid 183. [4] The Modern Conveyancer (ed. 1706) i 407.
[5] Op. cit. §§ 430, 431. [6] Ibid §§ 433, 435.
[7] Ibid § 436. [8] Ibid § 438. [9] Ibid § 440.
[10] Ibid § 441. [11] Ibid § 444. [12] Above 250.
[13] West, op. cit. § 430; Bridgman, op. cit. 316-317.
[14] West, op. cit. § 442; Modern Conveyancer (ed. 1706) i 249, 251; ii (ed. 1725) 357 seqq.
[15] West, op. cit. § 433—a rent of so much barley; Bridgman, op. cit. 16—a freehold demise for three lives, "Yielding and paying therefor yearly, during the said term, the rent of etc. . . . with a heriot at the decease of the said T.D. party to these presents. . . . And also yielding and paying yearly during the said term two rent hens, upon the etc., yearly; and two capons yearly at Easter; and also two daies average, called Reaping, in the time of harvest, with sufficient persons; together with all such tenancy, services, duties, customs, and contributions, as well in time of war as in time of peace, as have been usually paid or done for the said messuage or tenement."
[16] Last note; cp. Modern Conveyancer (ed. 1706) i 249-250—a covenant to fetch coals for the lessor; and in the same lease, at p. 251-252, the lessee covenants to deliver yearly to the lessor four strikes of apples.
[17] West, op. cit. § 315.
[18] Modern Conveyancer i 249. [19] Bridgman, op. cit. 317.

assessments whatsoever for the army or navy, or for any other matter or thing whatsoever, ordinary or extraordinary."[1] At the beginning of the eighteenth century we get provisoes as to insurance,[2] and precedents of renewable leases for lives,[3] and the renewals of such leases.[4]

(2) *The use made by the conveyancers of the rules of the land law, mediæval and modern.*

The short account of the contents of some of the leading types of conveyance, which I have just given, shows very clearly the skilful manner in which the conveyancers had so moulded the new forms of conveyance, as to make the utmost possible use of the new powers over their land, which the landowners had acquired. Their skill is still more apparent if we study in detail any collection of precedents of this period, and examine the manner in which the different instruments were adapted to many different sets of circumstances. As we have seen, the evolution of the marriage settlement is perhaps the best proof of their skill. But the parties to these settlements, though they married, did not always live happy ever afterwards; and the conveyancers showed an equal skill in dealing with the many exigencies brought about by their misfortunes, follies, or vices. That they were able to do so much was due to the manner in which the mediæval forms and the mediæval law had been allowed to subsist, in a half decadent condition, alongside of the new forms and the new law. Many things could be done by the use of a half obsolete mediæval conveyance, which could not be done by the use of the new forms; and, by the use of one or more of these conveyances, half obsolete rules of the mediæval land law could be prayed in aid to accomplish purposes which could be effected in no other way. Let us take one or two illustrations of the use thus made by the conveyancers of that mixture of mediæval and modern rules, which was so striking a feature of the land law during the whole of this period, and, in fact, right down to the reforms of the nineteenth century.

A disseisor by making a feoffment could convey a tortious fee simple.[5] Some conveyancers thought that it was possible for a person possessed of a long term of years to use this rule to convert the term into a fee simple. The owner of such a term assigned it to a third person in trust for himself, and then made a feoffment in fee. The uses of the feoffment were declared; and it was also declared that the term should attend the inheritance on the same trusts as the uses declared on the feoffment. "This plan,"

[1] Bridgman, op. cit. 363.
[2] Modern Conveyancer iii 80.
[3] Ibid ii 381-382.
[4] Ibid iii 1, 2.
[5] Above 46-47.

says Sanders, "is frequently adopted for the purpose of acquiring a freehold by disseisin, and at the same time of providing against a forfeiture of the term by the entry of the remainder man."[1] The process was completed by levying a fine, which shortened the period of limitation to five years.[2] Opinions differed as to whether this plan was effectual, and the courts eventually decided that it was not; but many thought that it was;[3] and, whether it was or not, it shows what possibilities were afforded by an ingenious mixture of mediæval and modern law. The shortening of the period of limitation secured by the levy of a fine, which caused its use for the purpose just described, made it useful also for many other purposes. It was in fact a most valuable weapon in the conveyancer's armoury. Thus Lord Hardwicke once said,[4] "If it is a mere legal title, and a man has purchased an estate which he sees himself has a defect upon the face of the deeds, yet the fine will be a bar, and not affect him with notice so as to make him a trustee for the person who had the right, because this would be carrying it much too far; for the defect upon the face of the deeds is often the occasion of the fine's being levied."

The conveyancers used, not only the mediæval forms of conveyance and the mediæval rules of law, but also the modern forms and the modern law to further the wishes of their clients. Here is an illustration:[5] "An estate, being settled upon A for life, with remainder to the use of trustees and their heirs during his life, in trust to support contingent remainders, with remainder to the first and every other son of A successively in tail, with remainders over; A, in order to enable his eldest son to suffer a common recovery, by a deed, not operating as a feoffment, bargain and sale, or lease and release, *surrenders* to his son his estate for life. This deed cannot operate in strictness as a *surrender*, on account of the intervening estate of the trustees; but it is the prevailing opinion of the profession, that it will operate as a covenant to stand seised; and the validity of many titles depends upon this

[1] Sanders, Uses (5th ed.) i 30; ii 21-22. [2] Above 51.

[3] Sanders, op. cit. ii. 22-26 n., and the authorities there cited.

[4] Story v. Lord Windsor (1743) 2 Atk. at p. 631; but, as he pointed out, ibid, the levy of a fine would not protect the purchaser with notice from a trustee, nor would it protect the assignee of a mortgagee with notice, from the equity of the mortgagor to redeem. Another illustration which shows the care with which it was necessary to observe the technical rules of procedure applicable to a common recovery, and the manner in which a fine might be used to cure a failure to observe them, is contained in a note to a precedent of a settlement in the Modern Conveyancer (ed. 1725) iii 233; the settlement contained a covenant to levy a fine to make a tenant to the præcipe, and the note explains that "this covenant to levy a fine was inserted, for that it was the essoin-day of the last return of the term before this deed was executed; so that the writ of entry would have been returnable before the tenant to the præcipe made, if it had not been made by fine."

[5] Sanders, op. cit. ii 97.

construction." Two other better known illustrations of the manner in which technical doctrines were used to evade the consequences of inconvenient rules are, firstly the mechanism of the conveyance to uses to bar dower,[1] and, secondly the manner in which the machinery of terms of years was used to prevent merger when merger was inexpedient,[2] or as a security against claims to dower,[3] or against mesne incumbrances.[4]

These few illustrations will show that the art and practice of conveyancing was becoming, during the sixteenth and seventeenth centuries, and had become during the eighteenth century, a very special branch of legal knowledge. It is not surprising, therefore, that the practice and opinions of the conveyancers gradually came to be regarded almost as a secondary source of law. Of the extent of their authority, and of the process by and reasons for which it was attained, I must, in conclusion, say a few words.

The Practice of the Conveyancers and the Law

We have seen that in the Middle Ages a class of professional conveyancers had not as yet arisen; but that the growth both of the complexity and the uniformity of the phrasing of conveyances was indicating the existence of a tendency in that direction.[5] The fact that no such class had as yet arisen made it somewhat uncertain whether the courts would hold any given conveyance to be effectual to carry out the intentions of the parties;[6] but we have seen that the supervision exercised by the courts over the limitations contained in fines, gave the parties to this form of conveyance some indications of the kind of limitations which the courts were likely to sanction, and that this was one of the many advantages which was secured by its employment.[7]

The growth of the complexity of the land law, during the sixteenth and seventeenth centuries, caused the growth of a class of professional conveyancers. We can see the beginnings of this process at the end of the seventeenth century; but only the beginnings.[8] The increase in the complexity of conveyances, and in the rules of law and equity, throughout the eighteenth century, and the altered position of the land law in relation to the other

[1] Williams, Real Property (22nd ed.) 396-398.

[2] Bridgman, Conveyances 325—"A lease for four score years, if the lessor live so long, in trust for himself to preserve his estate as tenant by the curtesy from being drowned in the inheritance which he is now about to purchase."

[3] Williams, Real Property (22nd ed.) 551-552; cp. Countess of Radnor v. Vandebendy (1697) Shower P.C. 69.

[4] Williams, op. cit. 550-551.

[5] Vol. iii 219.

[6] See the statement of Brooke, C.J., in Throckmerton v. Tracy (1556) Plowden at p. 163, cited vol. iii 219 n. 2.

[7] Ibid 252-253.

[8] Vol. vi 447-448.

branches of English law, made the conveyancers, at the end of the eighteenth century, a class very much apart from other legal practitioners. Mr. Tyrrell stated that serjeant Hill (1716-1808)[1] was the last lawyer of eminence who both practised as a conveyancer and attended to the business of the courts.[2] It is clear from Mr. Tyrrell's evidence that, at the beginning of the nineteenth century, an intimate knowledge of the law of real property was almost confined to a comparatively small number of eminent conveyancers;[3] and that the majority of lawyers—barristers as well as judges—depended for their information upon the opinions and writings of these conveyancers.[4]

Under these circumstances, it is not surprising to find that, from the beginning of the eighteenth century onwards, the practice and opinions of these conveyancers have been appealed to, as the best evidence of the existing state of the law upon many questions connected with the land law.[5] In 1697 "the common received opinion of Westminster Hall and of all conveyancers" was vouched as authority for the proposition that the existence of a term or a statute prevented dower.[6] In 1815 Lord Ellenborough, C.J., treated the common opinion of conveyancers as the best evidence of the state of the law;[7] in 1821 Lord Eldon said that the practice of conveyancers "amounted to a very considerable authority";[8] and in 1823 he said that "great weight should be given to that practice."[9] In 1864 Erle, C.J., repeated with approval the opinion of Lord Eldon;[10] and in 1899 Byrne, J., said that, "for the exposition of our very complicated real property law it is proper in the absence of judicial authority to resort to text books which have been recognized by the courts as representing the views and practice of conveyancers of repute."[11] In fact, as I have already

[1] He was made serjeant and king's serjeant in 1772; for some account of his career see Dict. Nat. Biog. *sub. voc.* George Hill.

[2] Real Property Commission, First Report App. 564.

[3] "There are no parts of the law of which barristers who belong to either of the other divisions of the profession (i.e. the common law and equity practitioners) usually attain so limited a knowledge as of those relating to conveyancing. It was stated in the House of Commons by a king's counsel of considerable practice in the courts of common law, that there were not above six persons who understood the laws of real property, and it may be safely asserted that, with the exception of Mr. Sugden, there is no barrister of eminence practising in any of the courts who has a perfect knowledge of their practical effects," ibid 563; for a reference to the members of the Old Conveyancers' Club see Re Holliday [1922] 2 Ch. 698.

[4] Real Property Commission, First Report, 563-565.

[5] A good account of the relevant cases on this topic will be found in Norton, Deeds 68-69.

[6] Countess of Radnor v. Vandebendy, Shower P.C. at p. 70.

[7] Isherwood v. Oldknow, 3 M. and S. at p. 396-397.

[8] Smith v. Doe, 2 Brod. and Bing. at p. 599.

[9] Howard v. Ducane, Turn. and Russ. at p. 87.

[10] Heelis v. Blain, 18 C.B. N.S. at p. 108.

[11] Hollis Hospital and Hague's Contract [1899] 2 Ch. at p. 551.

pointed out,[1] that practice is the foundation of many sections of the Conveyancing and Settled Land Acts—these Acts have codified it, and thus given it the dignity of statute law, just as these and many other Acts on other topics have codified our case law.

No doubt the practice of conveyancers is not law in the same sense as a statute or a judgment is law;[2] and if it is founded on an erroneous view of the law it will be disregarded.[3] But provided that it is unanimous,[4] and provided that it is not contrary to any ascertained rule of law,[5] it will be such cogent evidence of the law that it will rarely be disregarded by the courts. And there can be no question that the highly technical and complicated state of the land law makes this respect for the practice of the conveyancers very desirable; for it affords a strong guarantee to landowners that the instruments drawn up by their advisers will have the effect which they desire. In other words, it confers upon them the advantage which in the Middle Ages they got from the supervision exercised by the courts over the limitations contained in a fine.[6]

In fact, the growth of the modern respect for the opinion and practice of conveyancers was contemporaneous with, and was due to the same causes as, the rise of the conveyancers as a separate branch of the legal profession.[7] These causes can be summed up as follows: Firstly, we have seen that, during the latter part of the sixteenth and throughout the seventeenth centuries, the law upon many matters was in an experimental stage. Many conveyances, notably conveyances which attempted to create perpetuities, were, as Bacon had pointed out, in the nature of experiments.[8] It is clear that while the law of real property and the practice of conveyancing was in this stage, the attitude of the courts to the conveyancers would be one of criticism rather than of respect. The gradual settlement of the law changed all this. The conveyancers followed the decisions of the courts; and the manner in which they interpreted them naturally came to be regarded as the best evidence of what these decisions meant. Secondly, the growing complication of English law made some specialization necessary;[9]

[1] Vol. iii 219 n. 1.
[2] Anson v. Potter (1879) 13 C.D. at p. 143 *per* Bacon, V.C.
[3] Mason v. Ogden [1903] A.C. at p. 2 *per* Lord Halsbury, L.C.
[4] "Though the settled practice of conveyancers is to be looked upon as part of the common law, I do not think that a modern practice in which some conveyancers differ from others is to be treated as part of the law of the land," In re Ford and Hill (1879) 10 C.D. at p. 370 *per* James, L.J.
[5] Above n. 3.
[6] Above 384; vol. iii 252-253.
[7] Vol. vi 447-448.
[8] Above 214.
[9] "In consequence of the increase of commerce; of the amount and varieties of personal property; of the intricate transactions relating to trade; and of private rights and injuries; the laws of this country have become so complicated that it is almost impossible for any one to acquire an accurate knowledge of all their different branches,

and the growing complication of real property law tended to produce a class of men who knew little else. The law of real property no longer supplied the courts with the greater part of their business. It was no longer, as in the Middle Ages, in the sixteenth, and even to some extent in the earlier half of the seventeenth centuries, the most important branch of the common law. The study of other branches of the common law had become more profitable.[1] Naturally both barristers and judges relied upon the opinions and treatises of the conveyancers,[2] when cases which involved a knowledge of their special subject came before the courts. Thirdly, the authority of decided cases, which, by the end of the seventeenth century, was almost as well recognized in the court of Chancery as in the courts of common law[3] had increased the complication of the conveyancer's art.[4] Many cases had been decided on the construction both of deeds and wills; and right down to the middle of the nineteenth century, the tendency was to regard all these cases as precedents which could be cited in other cases of a similar kind.[5] The common forms of the conveyancers were naturally drawn up with these cases in view, so that the interpretation of their forms demanded more and more the skill of an expert. But of the growth of these rules of interpretation, and of their effects, good and bad, on the conveyancer's art, I shall speak more at length in the following section.

§ 11. The Interpretation of Conveyances[6]

As soon as the use of written documents, either to create or transfer interests in land, or to evidence their creation or transfer, became general, the need arose for rules to interpret the

and it may safely be asserted, that since the retirement of Lord Eldon there is no judge who is perfect master of every division of the laws, or able to decide with facility and certainty questions relating to such parts of them as may not have been included in his practice when at the bar," Real Property Commission, First Report App. 563.

[1] "The cases relating to real property bear a very small proportion to the number of other questions decided by the courts," ibid 563-564.

[2] Fearne's work had some influence in causing the reversal of Lord Mansfield's decision in Perrin v. Blake (vol. iii 109), and Sugden's letter to Charles Butler on the doctrine of presuming surrenders of attendant terms, introduced by the decision in Doe d. Patland v. Hilder, helped to procure the reversal of that decision, ibid 565.

[3] Vol. vi 668-670.

[4] Butler says, Reminiscences ii 273, "West's Symboleography, and the collection of precedents ascribed to Sir Orlando Bridgman, show, that the length of conveyances has been always on the increase. If we compare them—first, with the instruments in the Formulare of Madox, and afterwards with those in modern use, we shall find the increase in length, between the time of Madox and that of Sir Orlando Bridgman, was not less than that between the time of Sir Orlando and our own."

[5] Above 175; below 393-394.

[6] A full account of the law on this topic, and of the authorities from all periods in the history of the law, will be found in Norton, A Treatise on Deeds; and Hawkins, A Concise Treatise on he Construction of Wills; the references are to the 2nd ed. of the latter work.

expressions used in these documents. Thus we get the growth of general principles as to the methods to be used in interpreting or construing certain classes of documents, and of rules as to the interpretation or construction of certain expressions used by the parties to these documents. In the mediæval period these principles and rules of construction were meagre; but, during the sixteenth and seventeenth centuries, their number and complexity rapidly increased. The elaboration of these principles and rules during this period was due to several causes. Firstly, it was due to the growth in the number and complexity of the documents which came before the courts. Secondly, it was due to the fact that the construction of many of these documents was uncertain, because many of the principles of the modern land law were not as yet finally fixed. Thirdly, it was assisted by the large number of cases turning upon questions of construction which were reported during this period. Many of these cases laid down, both general principles of construction, and specific rules for the interpretation of certain words and clauses in the document which was before the court.

Thus a large number of rules were evolved which, being laid down in decided cases, could be cited in other cases. But what was the status of these rules? Were they rules of law, or were they merely rules of construction,[1] or was the decision merely an inference of fact as to the meaning of the particular document before the court? The fact that the difference between the status of the rules laid down in these various cases was imperfectly appreciated, was the cause of great confusion in the principles applicable to this branch of the law. We have seen, for instance, that the failure to observe the distinction between a rule of law and a rule of construction, was one of the reasons for the great controversies to which the rule in *Shelley's Case* gave rise in the eighteenth century.[2] We shall see that, in the eighteenth and early nineteenth centuries, the failure of the courts, and more especially the court of Chancery, to observe the distinction between a rule of construction and a finding of fact as to the meaning of a particular document, tended to frustate rather than to elucidate the intentions of the framers of documents. It tended to divert the attention of the judges from a consideration of the intention of the framers of the document before the court, to a consideration of supposed rules, laid down in cases in which an interpretation had been put upon documents containing analogous phrases.[3]

In the nineteenth century a clearer appreciation of the differences between the status of these various rules has helped to

[1] For this distinction see below 395-396. [2] Vol. iii 109-110.
[3] Vol. vi 671; above 175; below 393-394.

clear up this confusion; and in some cases the Legislature has intervened to establish or to change the status of some of these rules. The existing law cannot be said to be wholly satisfactory. Like other branches of law it bears upon itself the marks of the different epochs through which its various branches have passed.

I propose to sketch very briefly the history of this branch of the law under the two following heads: General Principles of Interpretation, and Rules governing the Interpretation of Particular Expressions; Rules of Law and Rules of Construction, and their Influence on the Development of the Land Law.

General Principles of Interpretation, and Rules governing the Interpretation of Particular Expressions

In this section I propose to give one or two illustrations, both of general principles for the interpretation of conveyances, and of rules as to the interpretation of particular expressions, which the courts have laid down at different periods. I shall give some illustrations of principles and rules both of law and of construction. In the following section I shall endeavour to show the meaning and bearings of this distinction; and of the influence of the different principles and rules of construction upon the development of the land law.

There are several cases reported in the Year Books, which show that, even at that early date, the courts were feeling their way to the establishment of certain general principles for the interpretation of different types of document. Thus it was established that errors, which would be fatal to the validity of a writ, would be overlooked in a deed or a pleading;[1] and that less attention would be paid to the words used, and more to the underlying intent, in a will than in a deed.[2] On the other hand, the intention must be ascertainable—otherwise the deed or will would be void for uncertainty.[3] We find also other more particular rules—of two repugnant clauses in a deed the first shall prevail;[4] repugnant words may be rejected if the sense is clear;[5] if a deed contains

[1] Y.B. 9 Hy. VII. Hil. pl. 8—"Nota que fuit dit per *Vavisor* . . . que si faux Latin soit en un bref . . . le bref abatera, et ne sera amend, pur ce que il poit avoir meliour bref: mes auterment est ou faux Latin est in un obligacion ou record ou in un ple."

[2] Y.B. 27 Hy. VIII. Mich. pl. 11—"Nota que Fitzherbert et Shelley agreerent clerement, si terre soit devise a un home et a ses heires males, le devisee aura un estat tail sans plus parolles: car la Ley est favourable a touts devises et construt eux accordant al entent del devisor . . . mes auterment est del don fait come devant."

[3] "En le case enter *Paston* et *Genney* fuit plede que *Genney* disoit a un *John P.* que il donnast a un des fitz *Jo. P.* les biens . . . *Genney* dit que le done n'est bon pur ce que ne fuist *J. P.* que duist aver les biens," Y.B. 11 Ed. IV. Trin. pl. 2; Bacon, Maxims, Works (Ed. Spedding) vii 355; Norton, op. cit. 98.

[4] Y.B. 1, 2 Ed. II. (S.S.) 126-127.

[5] Y.B. 14 Hy. VIII. Mich. pl. 5 at p. 13a *per* Brooke, J.

both a general and a particular statement, which are not inconsistent, the latter must prevail.[1]

During the succeeding centuries, these principles have been enlarged by a lengthy commentary of cases, decided both by the courts of common law and the court of Chancery. In the sixteenth and seventeenth centuries, the length and elaboration of conveyances and other documents brought many cases of this kind before the courts. The judgments in these cases enforced or explained the older rules, and added very many new rules. Let us look at one or two examples.

The main principles of the law, as to the effect of alterations in and additions to a deed, were settled during this period. Coke tells us that "of ancient time" the judges, if they saw that the deed was altered in a material place, held it to be void; but in his day they had grasped the fact that the alteration might have been made by the parties before delivery; and therefore it was left to the jury to say whether or not the alteration was made before delivery.[2] It was not till later that it was settled that an alteration must be presumed to have been made before delivery, as to presume otherwise would be to presume a wrong.[3] If, however, material alterations were made after delivery, without the consent of the parties, the deed was void.[4] In the sixteenth century, the destruction of the seal probably avoided the deed, even though it was destroyed by accident;[5] but, early in the seventeenth century, the modern rule was established that the deed is not affected by accidental destruction of the seal.[6] Similarly, it was during this period that what are perhaps the most fundamental rules of interpretation were expressly laid down—the rule that "words shall be construed according to the intent of the parties";[7] and the rule that "every part of the deed ought to be compared with the other and one entire sense ought to be made

[1] Y.B. 7 Ed. III. Hil. pl. 20—"La ont fait parle per parolx generals, et puis discend en parolx especials, si les parolx especials accordent a les parols generals, le fait serra entendu solonque les parolx especials"; Altham's Case (1610) 8 Co. Rep. at f. 154b.

[2] "Of ancient time if the deed appeared to be rased or interlined in places material, the judges adjudged upon the view the deed to be void. But of later time, the judges have left that to the jurors to try whether the rasing or interlining were before the delivery," Co. Litt. 225b; for the practice of the court in Bracton's day see vol. ii 250.

[3] "An interlineation (without anything appearing against it) will be presumed to be at the time of the making of the deed," Trowel v. Castle (1661) 1 Keb. at p. 22; Norton, op. cit. 26-27; as there is nothing wrong in altering a will there is no such presumption as to the time when alterations appearing on the face of a will have been made, Williams v. Aston (1860) 1 John. and Hem. at p. 118.

[4] Pigot's Case (1614) 11 Co. Rep. at p. 27a.

[5] Norton, op. cit. 41, and authorities there cited.

[6] Worsley v. Charnock (1599) Moore 570—the plaintiff having admitted the deed cannot allege in error the defect of the seal; Anon. (1624) Palmer 403.

[7] Throckmerton v. Tracy (1556) Plowden at p. 160 *per* Staunford, J.

thereof."[1] But in the same case Brooke, J., repudiated the first of these rules, and maintained that "the party ought to direct his meaning according to the law, and not the law according to his meaning";[2] and we shall see that this idea lived long in the law, and retarded the full recognition of the sovereignty of the intent of the parties.[3] Together with these general rules, other subordinate rules make their appearance. Thus we get the rules that, "in the common law the grant of every common person is taken most strongly against himself and most favourably towards the grantee";[4] "expressio eorum quæ tacite insunt nihil operatur";[5] and "contemporanea expositio est fortissima in lege."[6] It is clear also that the principle underlying the maxim "falsa demonstratio non nocet" was known and accepted;[7] and that its generality was limited by the rule that, if property was described in a manner which was wholly true as to some part of it, and only partly true as to another part of it, only the former part would pass.[8]

The rule that extrinsic evidence is not admissible to add to, alter, or contradict the terms of a deed, is probably as old as the Year Books;[9] but, like a good many other rules, it was formally stated by Coke—"it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by the averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted."[10] So far the rule is clear enough; but, even in Coke's day, it had become clear that, in construing a deed, extrinsic evidence must in some cases and for some purposes be admitted. Bacon laid it down in his Maxims that no extrinsic evidence of any kind was

[1] Throckmerton v. Tracy (1556) Plowden at p. 161 *per* Staunford, J.

[2] Ibid at p. 162; cp. Wigmore, Evidence iv 3477-3478.

[3] Below 394.

[4] Willion v. Berkley (1562) Plowden at p. 243 *per* Weston, J.; Throckmerton v. Tracy (1556) Plowden at p. 160 *per* Staunford, J.; Co. Litt. 183a; Bacon, Maxims, Works vii 333-342; Bacon comments at length on the rule, but says, at p. 336, that "this rule is the rule which is last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail."

[5] Co. Litt. 191a.

[6] Coke, Second Instit. 136; Norton, op. cit. 140-141.

[7] Wrotesley v. Adams (1558) Plowden at p. 191; Bacon, Maxims, Works vii 361.

[8] "If I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all these circumstances are true," Bacon, loc. cit.

[9] This would seem to follow from the rule as stated in Y.B. 11 Ed. IV. Trin. pl. 2 cited above 389 n. 3, as it seems to have occurred to no one to suggest that any evidence could be offered to explain the intention of the framers of the writing in that case; see Part II. c. 7 § 1 for the history of this rule.

[10] Countess of Rutland's Case (1604) 5 Co. Rep. at p. 26a.

permissible to remedy a patent ambiguity;[1] but that direct evidence of intention was admissible to solve a latent ambiguity, if it was a case of equivocation;[2] and that, in other cases of latent ambiguity, evidence of the circumstances could be given, but not direct evidence of intention.[3] We shall see that Bacon's treatment of the topic has come to form the starting point of the modern law;[4] but that his rule that no extrinsic evidence of any sort was permitted in a case of patent ambiguity, is now limited to direct extrinsic evidence of the intentions of the framer of the document.[5]

In the Year Books there seem to be very few cases in which rules were laid down as to the construction to be placed upon particular expressions used in conveyances. There are, however, a few such cases. Thus we have rulings that a limitation to the "heir"[6] or "heirs"[7] of a deceased person, conveys a fee simple to the person who happens to be his heir; and that if a limitation were made to A and his eldest child, A having then no child, the child took nothing.[8] It was during the sixteenth and seventeenth centuries that rules for the construction of particular expressions used in deeds and wills increased and multiplied. Let us take a few illustrations. We get rules as to the proper words for the limitation of a fee simple;[9] as to the meaning of the term children or issue in deeds;[10] as to the construction of a gift for life to A, remainder for a term to his executors;[11] as to the construction of a gift to A and his heirs, with a gift over if A dies without issue.[12] We get certain rules of construction as to gifts to a class. "B, having divers sons and daughters, A giveth land to

[1] "*Ambiguitas patens* is never holpen by averment: and the reason is, because, the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in the law. . . . For it holdeth generally that all ambiguity of words, by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election; but never by averment, but rather shall make the deed void for uncertainty," Bacon, Works vii 385.

[2] "But if it be *ambiguitas latens*, then otherwise it is. As if I grant my manor of S to J.F. and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that I have the manors both of South S and North S this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the parties intended should pass," ibid 385-386.

[3] Ibid 386-387. [4] Part II. c. 7 § 1.

[5] Hawkins' Principles of Legal Interpretation, Jurid. Soc. Papers ii 323-324.

[6] Y.B. 12 Ed. IV. Pasch. pl. 7. [7] Y.B. 11 Hy. IV. Trin. pl. 14.

[8] Y.BB. 17 Ed. III. (R.S.) 414; 18 Ed. III. (R.S.) 362; for other cases see Y.B. 9 Hy. V. Pasch. pl. 2—a gift to an Abbot and his heirs passes only an estate for life, as when he entered into religion "le sanke fuit corrupt que jamez en apres fuit recontinue"; Y.B. 22 Hy. VI. Mich. pl. 28—a gift to one et hæredibus without the word "suis" passed only a life estate.

[9] Litt. § 1; Co. Litt. 8b. [10] Ibid 20b. [11] Ibid 54b.

[12] Canon's Case (1558) 3 Leo. 5; Norton, op. cit. 338-339; a little later it was established that the words "die without issue" without more, mean prima facie failure of issue at any time, Norton, op. cit. 337.

B, *et liberis suis et a lour heires*, the father and all his children do take a fee simple jointly by force of these words 'their heirs'; but if he had no child at the time of the feoffment, the child born afterwards shall not take."[1] A good many cases in Coke's reports put particular constructions upon expressions used in devises. Thus in *Archer's Case*[2] it was held that a devise to A for life, and to his right and next heir male and the heirs male of the body of such right and next heir, gave an estate for life to A, with remainder in tail to his heir. It was held in *Wild's Case*[3] that in a devise the word "children" might be construed as a word of limitation, so that a devise to B and his children, B having no children at the time of the devise, gave B an estate tail; but that if B had children he and his children would take a joint estate for their lives. It was held in *Boraston's Case*[4] that a devise to A and his heirs when he attains 21, and till he attains that age to B, gave A an immediate vested estate, which is not defeasible by his death under 21.

As Professor Wigmore has pointed out, the prevailing idea at this period was that "the words of a legal document inherently possess a fixed and unalterable meaning";[5] and the cases which lay down these rules were, to a large extent, the product of this idea. In fact, it was thought to be dangerous to allow the expressions used by the parties to any written instrument to be interpreted by other than fixed rules.[6] These expressions, it was thought, always ought to have the same fixed meaning. The meaning which a case had put upon an expression must be always adhered to, as if the case assigning that meaning had laid down a rule of law; and, though intent must be considered, "it must be according as it appears upon the will, and according to the known rules of law; it is not to be left to a latitude, and as it may be guessed at."[7] As these rules grew in number and elaboration, less scope was given for a consideration of the real intentions of the parties, with the result that, according to the

[1] Co. Litt. 9a.

[2] (1597) 1 Co. Rep. 66b; Hawkins, op. cit. (2nd ed.) 213-214.

[3] (1599) 6 Co. Rep. at ff. 17a, 17b; Hawkins, op. cit. 243.

[4] (1587) 3 Co. Rep. 19a; Hawkins, op. cit. 284.

[5] Evidence iv 3477; and cp. the words of Brooke J., Plowden at p. 162 cited above 391.

[6] "The operation and effect of a contract cannot be determined but by rules of law . . . and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge and jury, who might construe or refine upon it at pleasure," Gilbert, Evidence 80, cited Wigmore, op. cit. iv 3478 n. 8; cp. Shelburne v. Inchiguin (1784) 1 Bro. C.C. at p. 342, and Lane v. Stanhope (1795) 6 T.R. at p. 354, there cited; see also Holt, C.J.'s, dissenting judgment in Coke v. Rawlinson (1700) 2 Ld. Raym. 831, which even then was considered to go too far in disregarding a testator's intent.

[7] Pocock v. Bishop of Lincoln (1821) 3 Brod. and Bing. at. p. 45 *per* Dallas, C.J.

admission of the judges themselves, these intentions were often disregarded.[1]

In later centuries the manner in which these rules were made and applied by the court of Chancery worked great hardship.

That court made a large number of rules for the construction of the various documents which came before it. And, in construing some of these documents, the court aimed, not so much at construing them, as at making a decree which would fully carry out what it imagined to be the intentions of the parties. "In matters executory," said Lord Cowper,[2] "as in case of articles or a will directing a conveyance, where the words of the articles or will are improper or informal, this court will not direct a conveyance according to such improper or informal expressions in the articles or will, but will order the conveyance or settlement to be made in a proper and legal manner as may best answer the intent of the parties." No doubt in so acting the court did substantial justice in many cases. But there was a very considerable danger involved in pursuing this course, especially in a system which recognized the binding force of decided cases. Decisions as to the true construction of the ambiguous words of one testator were cited as authorities for putting a similar construction upon the ambiguous words of another testator; and, because the words were ambiguous and the expressions loose, this practice did more harm than when applied to documents which were formal and complete.[3] Thus, for instance, there was created a large body of rules as to the circumstances under which a trust could be inferred from precatory words[4]—rules which there is reason to think produced results which by no means corresponded with the intentions of those who used them.[5] Similarly, rules grew up as to the expressions which would suffice to charge a testator's legacies on his real estate, which do not always carry conviction that the testator who used them meant them to have this result;[6] and the rules as to the quantum of the estate which a trustee would take under a devise became so complicated, that they were put on an entirely new footing by the Wills Act of 1837.[7]

[1] "No doubt in many of the cases the probability is that the effect given to the will is contrary to the intent of the testator," Pocock v. Bishop of Lincoln (1824) 3 Brod. and Bing. at p. 46 *per* Dallas, C.J.

[2] Stamford v. Hobart (1710) 3 Bro. P.C. at p. 33.

[3] See above 174-175 for the effects of this attitude upon the development of the idea of powers in the nature of a trust.

[4] Vol. vi 643.

[5] "In hearing case after case cited, I could not help feeling that the officious kindness of the court of Chancery in interposing trusts when in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed," Lambe v. Eames (1871) 6 Ch. App. at p. 599 *per* James, L.J.

[6] See the remarks of Lord Wensleydale in Greville v. Browne (1859) 7 H.L.C. at pp. 702-704.

[7] Hawkins, op. cit. 184, 185, 192-194; 1 Victoria c. 26 §§ 30, 31.

In fact, during the nineteenth century, the Legislature dealt with many of these rules as it dealt with other branches of English law. The Wills Act revised many of the rules, both of law and of construction, which had been built up by the courts of law and equity; and a similar revision was made by such Acts as Locke King's Acts[1] and the Conveyancing Act of 1881.[2] At the same time, the courts themselves have set their faces against the manufacture of new rules of construction; they have revised some of the older rules which had grown up during the eighteenth century—notably the rules as to the circumstances under which a trust would be inferred from precatory words;[3] and, while recognizing old established and existing rules, they no longer think that the consideration of lines of more or less analogous cases is a necessary preliminary to the ascertainment of the intentions of the framer of the document which is before the court.[4] In other words, they have come to recognize the distinction between a rule of construction and an inference of fact as to the meaning of a particular document.

Rules of Law and Rules of Construction, and their Influence on the Development of the Land Law

In our modern law the difference between a rule of law and a rule of construction is well recognized. That difference is perhaps most clearly pointed out in the following passage from the Preface to the first edition of Hawkins' Treatise on the Construction of Wills: "A rule of construction may always be reduced to the following form:—Certain words or expressions, which may mean either x or y shall, *prima facie*, be taken to mean x. A rule of construction always contains the saving clause 'unless a contrary intention appear by the will': though some rules are much stronger than others, and require a greater force of intention in the context to control them. On the other hand a rule of law, which is not a rule of construction (as the rule in *Shelley's Case*, the rules as to perpetuity, mortmain, lapse, etc.) acts independently of intention, and applies to dispositions of property in whatever

[1] Hawkins, op. cit. 328-329. [2] Ibid 43-44.

[3] Above 175; Thus Mr. Sanger very truly says, Hawkins, op. cit. 196 n., that "it is doubtful whether at the present day there is any rule of construction as to precatory trusts."

[4] "I have heard complaints at the Bar, and I have strongly shared in these complaints, that in all questions of this kind relating to wills, innumerable cases are cited which are of very little authority, because the words of one will differ so much from those of another, that there is very seldom any light derived from decisions upon other wills. If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed; but short of that, I think very little effect is to be attributed to former decided cases," Greville v. Browne (1859) 7 H.L.C. at p. 703 *per* Lord Wensleydale.

form of words expressed. This difference is fundamental, and lies at the root of the subject." But it will be obvious that the manner in which these rules have grown up tended to obscure this fundamental difference. Indeed, it was hardly possible that it should emerge clearly in sixteenth and seventeenth centuries, or even in the eighteenth century.

In the first place, in the sixteenth and seventeenth centuries, the law of evidence was in a somewhat elementary stage.[1] Many general rules of law—e.g. as to the admission of extrinsic evidence to elucidate the intention of the framer of an instrument, or as to the effect of alterations in a written instrument—were contained in disquisitions upon the meaning of the particular document then before the court. They were often placed side by side with rules of construction, such as e.g. the rule that the words of a grant are taken most strongly against the grantor, or *falsa demonstratio non nocet.* All these rules were laid down for law in decided cases, all were therefore contained in authorities which could be cited; so that, naturally, the fact that their character and validity were very different was obscured. And the same remark applies even more forcibly to other rules of law, which were necessarily phrased in the form of a rule of interpretation. Thus the rule in *Shelley's Case* does not, at first sight, appear to be very different from the rules in *Wild's Case* and *Archer's Case*, because it is stated in the form of a rule of interpretation. But, in fact, it rests ultimately on reasons connected with the incidents of feudal tenure, and the rules as to the kind of limitations permitted by the common law, which take it altogether outside the sphere of a mere rule of interpretation.[2] And exactly the same remark applies to the rule that any limitation which is capable of being construed as a contingent remainder must be so construed.[3]

In the second place, the fact that a certain rule had been laid down as to the construction of a particular expression in a decided case was meant to create, and did in fact create, a presumption that a similar construction would be put upon similar words in another document—as we have seen, the prevailing idea was that words and phrases ought to have a fixed meaning.[4] If the case was an old case and had been frequently followed, the rule of construction gradually acquired so much authority—so great a burden of proof was placed upon those who sought to negative it—that it tended to become in ordinary cases something very much like a rule of law. Thus we get a number of rules which, in effect, hover on the border line between rules of law and rules of construction.

[1] Vol. ix c. 7 § 1.
[2] Vol. iii 109-111.
[3] Above 126-128.
[4] Above 391, 393.

In the third place, the Legislature has introduced a set of statutory rules which are sometimes rules of law,[1] and sometimes rules of construction,[2] and sometimes rules which partake of the nature of both.[3] Sometimes these rules merely repeal existing rules of construction, and leave the courts free to interpret the document before them in accordance with the general rules of interpretation.[4]

In this, as in other branches of the law, legal development has been haphazard, and its results are often confusing; but it has achieved two very considerable results. In the first place, it has created certain general rules of law which must always be observed in the construction of documents. No body of law could dispense with some rules of law as to, e.g. the admission or rejection of extrinsic evidence, any more than it could dispense with a law of evidence; for these rules are part of the law of evidence. In the second place, it has created certain general principles of construction which are almost equally useful, because they show the framers of these documents, and those who are interested in ascertaining their meaning, the lines upon which the courts will go in interpreting them. It must be obvious that, without some such principles as these, our complicated land law would be almost unworkable; for, without them, no conveyancer could be certain that his draft would effect what he intended, nor could he give an opinion upon the effect of a deed or will upon which he was asked to advise.[5]

But another result has also been achieved as to the utility of which there is considerably more doubt. A certain number of rules of construction have been developed which, in the absence of an intention to the contrary, put a definite meaning on certain words, or phrases. No doubt, at the present day, when the rules of law are in most cases definite, and when the general principles of construction are also well ascertained, the utility of these rules is very questionable. But, if we look at the law as it existed in the sixteenth and seventeenth centuries, we may well doubt

[1] E.g. the rule contained in § 30 of the Conveyancing Act 1881 as to the devolution of trust and mortgage estates, Hawkins, op. cit. 43-44.

[2] E.g. some of the rules contained in the Dower Act 1833 as to the right to dower of women married before 1834, Hawkins, op. cit. 326-327.

[3] E.g. the provisions of Locke King's Act, Hawkins, op. cit. 327-328; and §§ 24-29 of the Wills Act 1837.

[4] E.g. § 19 of the Wills Act 1837 which provides that, "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

[5] See Hawkins, Principles of Legal Interpretation, Jurid. Soc. Papers ii 329-330 —as is there pointed out, "*Rules* of construction are matters, the expediency of which may be more doubtful; but *Principles* of construction there must be in every system of rational interpretation"; and that to say that no authorities are of any use in questions of interpretation is about as reasonable as to say "that no authorities are to be consulted on a question of equity."

whether those rules were as useless then as they are now. When the rules of the modern law were as yet in the making, when the general principles of construction were as yet new, they afforded some sort of guide to the conveyancers and testators of those days as to the words which they must use in order to secure certain results. No doubt the manufacture of these rules was carried too far by the court of Chancery, and continued long after the need for them had gone by. But let us not forget that they once had their use. If they did nothing else, they at least helped to teach the conveyancers to frame their common forms, and so to create that practice which has been no small factor in the making of our modern land law, and the chief factor in the application of its principles to the needs of landowners.[1]

We have seen that, in the Middle Ages, the land law, because it was the most important branch of English law, was the most highly developed and the most technical part of the common law; and that its condition was typical both of the merits and defects of the common law of that period.[2] The rise and growth of the use had shown that, even in the fourteenth and fifteenth centuries, its rules and doctrines were too narrow;[3] and obviously large developments of, and additions to, its rules and doctrines were needed to bring them into conformity with the new political social and economic ideas and wants of the modern English state. The adaptation of this highly developed and technical body of law to the changed world which was opening in the sixteenth century was a difficult task. But it is no exaggeration to say that the whole future history of the common law depended upon the manner in which it was faced; for the new needs and ideas of the sixteenth century had, while altering the character, hardly diminished the importance of the land law. If the common lawyers had been unable or unwilling to rise to the occasion, some of the many courts which administered bodies of law, which were competing with the common law, would have supplied the want of an up-to-date land law, and would thus have gone far to deprive the common law of its control over the development of the modern law. Fortunately for the common law the political strength of the common lawyers, and their technical skill, averted this danger. They rose to the occasion; retained their control of the land law; and, on the foundation of the mediæval land law, erected, with the help of the Legislature, the elaborate superstructure of the modern law. In later centuries, these rules of the modern law became the foundation of new equitable developments; just as, in an earlier

[1] For the growth and influence of similar rules in the domain of contract see vol. viii 73. [2] Vol. ii 590. [3] Ibid 593-595.

period, the rules of the mediæval common law had been the foundation of those developments of the use by the mediæval chancellors, which, as the result of the statute of Uses, had, with some modifications, been absorbed into the modern common law.

Our judgment upon the body of law which has resulted from these developments will depend largely upon the point of view which we adopt.

To the law reformers of Bentham's school, the English land law, as it existed at the end of the eighteenth and the beginning of the nineteenth centuries, was a shocking example of all that a body of law should not be. It was a composite mixture of common law and statute law, and of contradictory rules of law and equity. It was replete with the obsolete technicalities and legal fictions of many different epochs in the history of the law.[1] Its ordinary methods of conveyance were, to use Mill's striking phrase, "cabinets of historical curiosities."[2] Dealings in land were inordinately expensive; and, even after these expenses had been incurred, titles were often insecure. Even after the reforms of the nineteenth century it has remained the most technical and complicated branch of English law, and the least suited to the needs of the twentieth century.[3]

But, if we look at the land law with the eye, not of the reformer of the nineteenth and twentieth centuries, but of the historian of the technical development of its rules during the sixteenth, seventeenth and eighteenth centuries, we must pass a different judgment. The erection, upon the basis of the rules of the mediæval common law and the statutes of the sixteenth century, of the elaborate superstructure of its rules, was a technical achievement of which the lawyers of any system might be proud. These English lawyers, during the sixteenth seventeenth and eighteenth centuries, had moulded into an elaborate system, the mediæval doctrines, the new legal and equitable doctrines of these three centuries, and the provisions of statutes of all periods in the history of English law; and, till the end of the eighteenth century, this system met the needs of different classes of landowners. No doubt some of its rules were clumsy, some were uncertain, and some were inequitable. But on the whole they were just and flexible rules. The sixteenth century was not marked in England, as it was marked in Germany, by a peasant revolt; and we

[1] "All ages of English history have given one another rendezvous in English law; their several products may be seen altogether, not interfused, but heaped one upon another, as many different ages of the earth may be read in some perpendicular section of its surface—the deposits of each successive period not substituted, but superimposed on those of the preceding," Mill, Dissertations and Discussions i 369.

[2] Ibid i 370.

[3] See Maitland's Essay on the Law of Real Property, Collected Papers i 162-201.

have seen that the settlement in England of the position of the copyholder, removed a set of grievances which, in France, were among the causes of the first French Revolution.[1] Moreover, the rules of the modern land law impeded neither the economic developments of the sixteenth and seventeenth centuries, nor the progress of the industrial revolution of the latter part of the eighteenth and the beginning of the nineteenth centuries.

Lawyers who could thus adapt the mediæval land law to modern needs were not likely to find much difficulty in similarly adapting other branches of the common law, or in developing new branches of law as new needs arose. This was an easier task, both because the ground was less cumbered by mediæval rules, and because, during the latter part of the mediæval period, developments had already been made in the law as to the possession and ownership of chattels, in the law of contract, and in the principles of liability for wrongs. Further developments, along the lines foreshadowed at the close of the mediæval period, helped the common lawyers to construct, not only our modern law as to the possession and ownership of chattels, as to contracts and quasi-contracts, and as to crime and tort, but also our modern system of mercantile law. The manner in which these and other branches of our modern English law were developed from their mediæval origins I shall describe in the ensuing chapters of this Book.

[1] Vol. iii 210-213; vol. iv 362-363; Maine, Early Law and Custom 299 seqq.

CHAPTER II

CHATTELS PERSONAL

IF we look at any modern text-book on the subject of personal property, we can see that this rubric embraces a large number of very diverse branches of law. There is the law as to the ownership and possession of corporeal chattels; and the law as to the many different kinds of choses in action—rights to recover a debt or damages, stocks and shares, patents and copyrights, trade marks and trade names. There are various branches of mercantile and maritime law, such as the law as to negotiable instruments, companies, insurance, and ships. There is some information about matters which are equally parts of the ordinary common law and of mercantile law, such as bankruptcy and contracts. Family law makes its appearance in chapters on the proprietary relationships of husband and wife, and on settlements of personal property; and the law of succession in chapters devoted to wills, intestacy, and administration of assets.

The history of the majority of these topics will not be touched on in this chapter. The law of contract and quasi-contract, and origins of mercantile and maritime law will be dealt with in chapters of their own.[1] The law of succession,[2] and the proprietary relationship of husband and wife,[3] have already been partially dealt with, and more will be said of the development of these branches of the law in the next Book.

At this point I shall deal with the subject of the ownership and possession of chattels, and with the beginnings of the law as to choses in action. In my treatment of the ownership and possession of chattels, I shall, as in the case of the land law, speak first of the development, during this period, of the forms of action which have shaped the growth of this branch of the law; and we shall see that, from this point of view, the most important of these actions is the action of trover and conversion, of the origins of which I have already said something. Secondly, I shall say something of the evolution of the main principles of this branch of the law. Thirdly, I shall discuss the earlier history of choses

[1] Chaps. iii. and iv. [2] Vol. iii Chap. v. [3] Ibid 520-533.

in action. My arrangement will therefore be as follows: § 1. the Action of Trover and Conversion; § 2. the Ownership and Possession of Chattels; and § 3. Choses in Action.

§ 1. The Action of Trover and Conversion.

Just as the mediæval theory of the ownership and possession of land was modified by the rise of the action of ejectment,[1] so the mediæval theory of the ownership and possession of chattels was modified by the development of the action of trover and conversion, and other actions on the case supplementary to it. In both cases, it was through the gradual growth of the law as to the conditions under which these actions lay, and as to their relations to the older forms of action, that the principles of the modern law of ownership and possession were built up. Therefore the history of the development of the action of trover is a necessary introduction to the history of the law as to ownership and possession.

With the origins of this action I have already dealt. We have seen that it was at first supplementary to the actions of detinue *sur bailment* and detinue *sur trover*.[2] We must now trace the process by which it to a large extent superseded both these forms of detinue, and became to some extent alternative to the actions of replevin and trespass. In order to understand the sphere which the action gradually came to fill, and the limitations upon that sphere, it will be necessary to trace the development of the law as to the essential points which a plaintiff must prove in order to succeed in his action. We shall see that it was through this development that the action was able to expand at the expense of other forms of actions, and that its sphere in modern law was finally settled. It will then be necessary to say something, firstly, of the proprietary or possessory character which this and other actions in tort assumed in consequence of these developments; and, secondly, of their relations inter se. My arrangement of the subject will therefore be as follows: The Growth, Expansion, and Settlement of the Sphere of the Action; the Limitations upon its Sphere; the Nature of this and other Supplementary or Cognate Personal Actions, and their Relations inter se.

The Growth, Expansion, and Settlement of the Sphere of the Action

To succeed in an action of trover the plaintiff must prove, firstly, that the defendant was guilty of a conversion of the chattel, and, secondly, that he himself had a right to its possession, which

[1] Above 57 seqq. [2] Vol. iii 350-351.

was both absolute and immediate. The growth of the action centres mainly round the gradual expansion and definition of the idea of conversion: the settlement of the other conditions under which the action lay, centres round the rule that the plaintiff must prove a right to possession, and the definition of its absolute and immediate character. I shall therefore take these two requisites for success in the action as the main division of this subject.

(1) The extension of the meaning of the term "conversion."

The original and natural meaning of the term conversion can best be seen from the allegation made by a plaintiff in his declaration in trover. He alleged, in substance, that the defendant, intending to deceive him and to deprive him of his property, did not restore his chattel, but converted it to his own use and benefit, and disposed of it, to the damage of him the plaintiff.[1] Thus the essence of conversion is a positive misfeasance on the part of the defendant, which deprives the plaintiff of the use and benefit of chattels, to the possession of which he has a right. It is, in other words, a wrong to his right to possess, as contrasted with trespass de bonis asportatis, which is a wrong to his actual possession. In this it resembles the wrong which was remedied by the action of detinue. But, while the gist of the action of detinue was detention, the gist of the action of trover was the conversion—the wrongful disposition of the plaintiff's property. Thus the spheres of these three personal actions were in theory quite distinct. Trespass de bonis asportatis lay for a wrongful taking of the plaintiff's chattels by the defendant from the plaintiff's possession; detinue lay for the wrongful detention of the plaintiff's chattels by the defendant; and trover lay for the wrongful conversion or disposition of the plaintiff's chattels by the defendant.[2] The two essential elements, then, of a conversion are, firstly, a positive act of misfeasance, and, secondly, the diversion of the use and benefit of the chattels from the plaintiff to the defendant; and, as we shall see, these are essential elements in the tort of conversion in our modern law. But, as Sir F. Pollock has said,[3] "the natural meaning of converting property to one's own use has long been left behind. It came to be seen that the actual diversion of

[1] The following are the essential clauses: After setting out the loss of the plaintiff and the finding by the defendant, the declaration alleges that the defendant, "sciens predictum equum fore equum ipsius W (the plaintiff), et ad ipsum W de jure spectare et pertinere, machinans tamen et fraudulenter intendens ipsum W. in hac parte callide et subdole decipere et defraudare, predictum equum, licet saepius requisitus etc., praefato W. nondum deliberavit, sed equum predictum . . . ad usum et commodum ipsius R (the defendant) proprium convertit et disposuit ad dampnum ipsius W (the Plaintiff) etc."

[2] Salmond, L.Q.R. xxi 43-45.

[3] Law of Torts (12th ed.) 361.

the benefit arising from use and possession was only one aspect of the wrong, and not a constant one. It did not matter to the plaintiff whether it was the defendant, or a third person taking delivery from the defendant, who used his goods, or whether they were used at all; the essence of the injury was that the use and possession were dealt with in a manner adverse to the plaintiff and inconsistent with his right of dominion." We must now trace the steps by which this large extension in the meaning of the term conversion was made.

This extension was not made easily. It was only gradually that the judges of the late sixteenth and early seventeenth centuries were induced to take the first steps which rendered future developments possible. In the minds of some of them there lingered a survival of the idea that the spheres of the separate forms of action should not be allowed to encroach unduly upon one another. Thus it was said in 1556, in the case of *Lord Mounteagle v. Countess of Worcester*,[1] that an action on the case would not lie "because it appears that the plaintiff may well maintain an action of detinue, and when a man has an ordinary writ ready framed in the Register for his case, then he shall not sue out a new form of writ." Similarly, in the case of *Watson v. Smith*,[2] Walmesley, Glanville, and Kingsmill, JJ., following older authorities upon the scope of detinue,[3] held that the action of trover did not lie for a bond, "for if he finds the obligation and cancels it, trespass vi et armis lies; for he destroys the thing found; and if he receive the money, and deliver the obligation to the obligor, accompt lies, and not this action." It is true, as we have seen, that even in the mediæval period, the judges had given up the attempt to treat the forms of action as wholly separate. It was admitted that in certain cases they overlapped, and that then the parties could elect to use what form they pleased.[4] Indeed, we have seen that certain of the personal actions had even been allowed to encroach upon the sphere of the real actions.[5] For all that, some

[1] Dyer at f. 121b.

[2] (1600) Cro. Eliza. 723; no doubt the court considered that, if the money had been received, it was in substance an action for money, for which detinue never lay, unless for coins specifically identified; and that the same rule should be applied to trover; but, as we shall see, below 410, it was held in Isaack v. Clark (1615) 2 Bulstr. at p. 314 that trover, unlike detinue, would lie for the conversion of money, because the gist of the action was not, as in the case of detinue, the detention of a specific thing, but a conversion; cp. vol. iii 357; and the next note.

[3] F.N.B. 138 B, "If a man deliver money not in any bag or chest to redeliver back or to deliver over unto a stranger; now he to whom the money shall be delivered shall not have action of detinue for the money, but a writ of accompt; because detinue ought to be of a thing which is certain; as of money in bags"; see Y.B. 41 Ed. III. Pasch. pl. 5 = Bro. Ab. *Accompt* pl. 11; and cp. Y.B. 2 Rich. III. Mich. pl. 39; in such a case the plaintiff could bring debt instead of account, Y.BB. 41 Ed. III. Pasch. pl. 5; 6 Ed. IV. Hil. pl. 6.

[4] Vol. ii 454, 455 and n. 1.

[5] Vol. iii 26-28.

of the judges did not wholly approve of an extension of one form of action so large that it could supersede other well established forms. In *Ferrer's Case* Coke lamented the way in which the action of ejectment had been allowed to supersede the real actions.[1] In the same way, we shall see that he did not wholly approve of such an extension of the idea of conversion, that it would enable this new action of trover to supersede almost entirely the action of detinue.[2]

But, in spite of this feeling, the decisive steps had begun to be taken in the late sixteenth and early seventeenth centuries. The struggle of the common law courts with their rivals made it advisable to favour those forms of action which offered the best and speediest remedies; and so trover was allowed to begin to supersede detinue, and to encroach upon the spheres of replevin and trespass, for much the same reasons as assumpsit was allowed to encroach upon the sphere of debt,[3] and ejectment upon the sphere of the real actions.[4] Thus in 1623[5] and 1633[6] the case of *Watson v. Smith*[7] was disregarded, and trover was successfully brought for a bond; and these decisions were followed by Holt, C.J., in 1699[8] and 1701.[9] The process went on more quickly in the latter half of the seventeenth century; at the end of that century it was well on the way to completion; and, during the eighteenth and earlier half of the nineteenth centuries, it was finally completed.

Two main lines of development, along which the extension of the idea of conversion was pursued, correspond to the two essential elements in the tort of conversion. In the first place, there was an extension of the definition of the positive act of misfeasance sufficient to give rise to the action. It was this extension which enabled this action almost to supersede detinue. In the second place, there was an extension of the definition of the acts, constituting a diversion of the use and benefit of the chattels from the plaintiff to the defendant, sufficient to give rise to the action. It was this extension which enabled this action to encroach on the spheres of replevin and trespass.

(i) *The extension of the definition of the positive act of misfeasance sufficient to give rise to the action.*

As late as the end of the sixteenth century, the courts still showed a disposition to insist strongly on the positive character of the act of misfeasance, which a plaintiff must prove to succeed in an

[1] (1599) 6 Co. Rep. at f. 9a.
[2] Below 409.
[3] Vol. iii 441 seqq.
[4] Above 7-9.
[5] Upchard v. Tatam, Cro. Jac. 637.
[6] Wilson v. Chambers, Cro. Car. 262.
[7] (1600) Cro. Eliza. 723; above 404.
[8] Anon. Salk. 126.
[9] Ford v. Hopkins, 1 Salk. 283-284.

action of trover. Thus in 1591, in the case of *Mulgrave v. Ogden*,[1] it was held that, though a finder could be made liable in this action if he misused the property found, he could not be made liable for loss resulting from his negligent custody. "If a man," said Walmesley, J.,[2] "find my garments, and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth; but if he weareth my garments it is otherwise, for wearing is a conversion." But it was pointed out by Anderson, J., in the contemporaneous case of *Vandrink and Archer*,[3] that, if misuse of the chattels found was proved, the mere fact that the finder was ready to deliver was not a good plea to this action, as it would have been to an action of detinue based on a finding. Indeed, as we have seen, the fact that this was a good plea to an action of detinue was one of the principal reasons for the invention of this new form of action.[4] We have seen, too, that the same law as was applied to the finder was applied also to the bailee.[5] This action lay against a bailee who had misused the goods; and it was held in 1510,[6] that a sale by the bailee of the goods bailed to him, amounted to a positive act of misfeasance for which this action lay. It did not, however, lie against a bailee[7] or a finder[8] who had merely failed to deliver the goods bailed, as such a failure to deliver was a mere nonfeasance. On the other hand, it would seem that if the goods were damaged, by reason of the negligent custody of the bailee, there was some tendency to hold that such negligent custody might, in the case of the bailee as distinguished from the finder, be regarded as a positive misfeasance, because the bailee, unlike the finder, owed a duty to the owner to take care.[9] But this suggestion never materialized; and it is still the

[1] Cro. Eliza. 219; S.C. 1 Leo. 224; cp. Grumbleton v. Grafton (1601) Cro. Eliza. 781 for a case in which such a positive act was proved against a bailee.

[2] (1591) 1 Leo. 224.

[3] "The nature of the action, it is an action upon the case, the cause the trover and conversion; then for the latter plea, his readiness to deliver it, it cannot be any answer to the declaration of the plaintiff: for this action is not debt or detinue, when the thing itself is to be delivered, for in such a case the plea had been good, but the conversion is the special cause of this action which by this is not answered," ibid at p. 223; to the same effect Windham, J., ibid.

[4] Vol. iii 350. [5] Ibid. [6] Anon. Keilway 160 pl. 2.

[7] Owen v. Lewyn (1672) 1 Vent. 223 *per* Hale, C.B.; cp. Isaack v. Clark (1614) 2 Bulstr. at p. 308 *per* Haughton, J.; ibid at p. 311 *per* Croke, J.; ibid at p. 314 *per* Coke, C.J.

[8] Isaack v. Clark (1614) 2 Bulstr. at p. 313 *per* Coke, C.J.

[9] Walgrave v. Ogden (1591) 1 Leo. 224—"An action upon the case was brought upon a trover and conversion of twenty barrels of butter, and declared that by negligent keeping of these they were become of little value, upon which there was a demurrer in law; and by the opinion of the court upon this matter no action lieth; for a man who comes to goods by trover is not bound to keep them so safely as he who comes to them by baylement"; we may perhaps see the same idea in Coke's statement in Isaack v. Clark (1614) 2 Bulstr. at p. 313 that, in the case of a pledge, a demand and a refusal will amount to a conversion, see below 410; in the report of Walgrave v. Ogden, sub. nom. Mulgrave v. Ogden, Cro. Eliza. 219, there is no hint of this distinction.

law that for mere nonfeasance, either by finder or bailee, this action will not lie.[1] Though, as we shall see, the owner can get redress by another form of action,[2] he cannot get redress by action of trover.

Thus, up to the end of the sixteenth century, the courts insisted strongly upon the rule that this action would not lie unless a positive act of misfeasance were proved. It followed, therefore, that the spheres of this action and the action of detinue were quite distinct; for detinue lay against a person who had been guilty of no misfeasance, but who had merely failed to deliver goods in his possession in breach of a legal duty to deliver them. We have seen that the law still holds to this view that there can be no conversion, and therefore no cause of action in trover, without a positive act of misfeasance. How then was it possible to extend the action so as to cover the sphere of detinue without departing from this principle? The answer to this question is to be found in a gradual alteration of the views of the judges as to what sorts of acts amount to misfeasance, and what to nonfeasance.

The line between misfeasance and nonfeasance is easy enough to draw in theory; but it is not always easy to see on which side of the line certain sets of fact fall. It was one of these doubtful sets of fact which, by affording an opportunity for a readjustment of the line, made an extension of the sphere of this action possible. Suppose that an owner had requested the finder or the bailee of his goods to deliver them to him, and that the finder or bailee had wrongfully refused to deliver them—was this wrongful refusal misfeasance or nonfeasance? Mere neglect to deliver was undoubtedly nonfeasance only; but could not a positive refusal to deliver be regarded as misfeasance? If it could be so regarded, it is clear that an easy method would be provided of so extending the scope of the action that it would cover practically the whole field of detinue.

Naturally this was a point upon which judicial opinion was much divided; for it was fairly arguable either way. In 1455 Prisot, C.J., had ruled that a refusal to deliver on request was a misfeasance for which trespass would lie;[3] and in 1595, in the

[1] (1705) Anon. 2 Salk. 655; Ross v. Johnson (1772) 5 Burr 2825; Williams v. Geese (1837) 3 Bing. N.C. 849; Heald v. Carey (1852) 11 C.B. 977.

[2] Below 432-434.

[3] Y.B. 33 Hy. VI. Trin. pl. 12—Wangford arg. says "Sir, jeo entend que si jeo perd un box ove charters etc. touchant terres a que jeo ay nul title, uncore jeo auray accion de detinue"; and Prisot, C.J., replies, "Jeo entend que non: quar en votre cas vous ferez a luy notice que trove etc., et ferez un request de les rebaillier, et s'il ne veut, vous aurez action de trespass vers luy: car per le invencion il ne fist nul tort, mes or le tort commence par le detinue, quand il avoit connusance."

case of *Eason v. Newman*,[1] all the judges of the Queen's Bench, in the absence of Popham, C.J., ruled that a refusal to deliver on request was a conversion for which this action lay. But Popham denied that this was law, and said that the contrary had been ruled in 1581; and it is clear from the judgments in *Isaack v. Clark*[2] that opinions at this period were very divided. By the beginning of the following century, however, the judges had come to the conclusion that it was impossible to say definitely whether or not a refusal to deliver on request was a conversion. They had come to the conclusion that a refusal to deliver on request was presumptive evidence of a conversion; but whether or not it amounted to a conversion depended on the surrounding circumstances, which might or might not rebut the presumption of a conversion raised by the refusal to deliver on request. Thus in 1614, in *The Case of the Chancellor of the University of Oxford*,[3] Coke said that, "if A brings an action on the case against B upon trover and conversion of plate jewels etc., and the defendant pleads not guilty, now it is good evidence prima facie to prove a conversion, that the plaintiff requested the defendant to deliver them, and he refused, and therefore it shall be presumed that he has converted them to his use. But yet it is but evidence;" for, as he pointed out, in every action of detinue a request and refusal is alleged in the declaration; so that it could not be said that a mere request and refusal necessarily amounted to a conversion.[4] All that could be said was that it gave rise to such a presumption.

The law was still involved in the forms of action. The judges were still reluctant to allow the action of trover and conversion to usurp the sphere of detinue, whether sur trover or sur bailment. Hence they thought it necessary to lay down rules designed to distinguish between the cases where a refusal to deliver on request did, and where it did not, amount to a conversion, in such a way as to preserve the distinction between these two forms of action. These rules, as summed up by Coke in the case of *Isaack v. Clark*,[5] give a good account of the stage of development which the law had reached in the earlier half of the seventeenth century, and show us that it is beginning to make some approach to the modern rules.

The facts of that case were as follows:—One Adams had recovered against one Lewis the sum of £40 13s. 4d. A writ of Ca. Sa. was issued against Lewis; and, he having disappeared, a

[1] Cro. Eliza. 495.
[2] (1614) 2 Bulstr. 306; below 409-411.
[3] 10 Co. Rep. at ff. 56b, 57a.
[4] "For the conversion ought to alter the action of detinue to a trespass upon the case, which a denial cannot do in law; for in every action of detinue there is alleged in the declaration a request and refusal."
[5] (1614) 2 Bulstr. at pp. 311-314.

writ of Fi. Fa. was issued against Watkins, one of his pledges. By virtue of this writ the defendant Clark took three butts of sack in execution. To stop the sale of the wine, Isaack, the plaintiff, gave to the defendant a purse containing £22, to be held by him as a pledge for the redelivery of the sack, in case Watkins did not get from Adams a consent to a stay of the execution. Watkins did not get a stay of execution; but nevertheless the plaintiff Isaack requested Clark to deliver the purse and the money, which Clark refused to do. Isaack thereupon brought his action for conversion.

Judgment was given for the defendant for the following reasons: All the judges agreed that a refusal to deliver upon request was good evidence of a conversion; but, if the contrary were showed, then there was no conversion.[1] The question whether in any given state of facts the defendant was guilty of a conversion was a question of law. To solve this question of law certain leading distinctions must be kept in mind. If a man finds goods which are really lost "and lays them up for the owner," there is a trover but no conversion. "It is the law of charity to lay up the goods which do thus come to his hands by trover, and no trespass shall lie for this."[2] A refusal to deliver in such a case is not a trespass, for it is a mere nonfeasance, "and in no case shall you have a man to be a trespasser upon the case without some act done"; for "when possession is vacua," refusal to deliver is a mere nonfeasance, and "nonfeasans shall not make a man to be a trespasser."[3] Nor can such a refusal be said to be a conversion. The distinction between the forms of action must be preserved; and, if it were law that a mere refusal in such a case amounted to a conversion, all form would be confounded; "for then, this way, every action of detinue shall be action upon the case, because there is a denyer."[4] No doubt an action on the case will lie against a finder of goods "for his ill and negligent keeping of them"; but not an action of trover and conversion.[5] On the other hand, if he sold or otherwise disposed of them, he would be guilty of a conversion, just as a bailee would be guilty in the like circumstances.[6] A fortiori the same principles which apply to the finder of goods really lost, apply to the case where there has been a bailment. "If one doth bail goods to another to keep and to deliver upon request, if it be found that he required the delivery of them, and he to do this refused, no trespass *vi et armis* lieth for this, because it is but a nonfeasans."[7] The same

[1] 2 Bulstr. at p. 314.
[2] At p. 312, following the dictum in Y.B. 2 Rich. III. Mich. pl. 39 p. 15.
[3] At p. 312. [4] At p. 313. [5] At p. 312.
[6] At p. 313. [7] At p. 312.

principle applies to this action of trover and conversion, which is an action of trespass upon the case. Therefore, just as no action of trespass lies against a second bailee to whom my bailee has bailed the goods, so no action of trover can lie.[1] As against the first bailee the proper form of action is detinue sur bailment: as against the second bailee the proper form of action is detinue sur trover or on a devenerunt ad manus.[2] The case is altogether different if "one takes goods when there is no danger of their being lost, or finds them before they are lost.[3] For the proposition that such a taking amounted to a trespass, and that non-delivery amounted to a conversion, there was good authority in the Year Books.[4] A fortiori a refusal to deliver on request was in such a case a conversion. Similarly, "if one doth pledge oxen, utensils, or deliver money; if he require them, and the other doth refuse to deliver them, an action upon the case *sur trover* lieth."[5] In the case of the pledgee, the refusal being in breach of his duty, might be regarded as a positive act of misfeasance.[6] In the case of the money, inasmuch as detinue did not lie for "money which cannot be known from other money," since no restoration was possible,[7] trover lay.

Some of the most important principles laid down in this case are the law of the present day. Firstly, it has ever since this case been the law that a demand and a refusal is good evidence of a conversion. "It is common learning," said Patterson, J., in *Balme v. Hutton*,[8] "that a demand and refusal are evidence only of a conversion." "A demand and refusal," said Blackburn, J., in *Hollins v. Fowler*,[9] "is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bona fide* doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion." These propositions are supported by an unbroken series of authorities from the seventeenth century onwards.[10] Secondly, the position of the finder of the goods in

[1] At p. 312. [2] At pp. 312-313. [3] At p. 312.

[4] Y.B. 46 Ed. III. Trin. pl. 1; cp. Pollock and Wright, Possession 173-174; Y.BB. 2 Rich. III. Mich. pl. 39 p. 15; 21 Hy. VII. Trin. pl. 5.

[5] At p. 313. [6] Above 407 n. 3. [7] Above 404 and n. 2.

[8] (1833) 9 Bing. at p. 475; Holt, C.J., it is true, in Baldwin v. Cole (1705) 6 Mod. 212, ruled "that the very denial of goods to him that has a right to demand them is an actual conversion, and not evidence of it, as has been holden"; and in 3 Salk. 365 it was said that denial is conversion if the defendant came to the possession by finding, but if he had the goods by delivery it is only evidence of a conversion. This view was also expressed in Bruen v. Roe (1665) 1 Sid. 264, below 416 n. 8; but this distinction is not recognized in the later cases.

[9] (1875) L.R. 7 H. of L. at p. 766.

[10] Williams Saunders 47, note to Wilbraham v. Snow.

modern law is substantially that set forth by Coke.[1] "When a man doth find goods, it hath been said, and so commonly held, that if he doth dispossess himself of them, by this he shall be discharged,[2] but this is not so . . .; for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to anyone, unless it be unto the right owner, he shall be charged for them. For at the first it is in his election whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely. A man therefore which finds goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him. If the owner comes unto him and demands them, and he answers him that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them; this refusal is no conversion if he do keep them for him." The last part of this passage was cited by Blackburn, J., as authority for his similar proposition in the passage from his opinion in *Hollins v. Fowler* already cited.[3] Other parts of his opinion are equally in agreement with Coke's propositions. That an innocent possessor, such as a finder, who disposes of the goods, is guilty of a conversion, was the actual point decided in *Hollins v. Fowler;* and, dealing with the powers of the finder, Blackburn, J., says that he "is justified in taking steps for their protection and safe custody till he finds the true owner"; and that "therefore it is no conversion if he *bona fide* removes them to a place of security." The main addition, which *Hollins v. Fowler* and other later cases made to the law as laid down in *Isaack v. Clark*, is the rule as to the position of a person dealing with goods at the request of a finder or other possessor, in the *bona fide* belief that the finder or possessor is the owner. Such a person is excused if, what he did would have been excusable had it been done by the finder or other possessor who entrusted him with the goods.[4]

In other points, however, the principles laid down in *Isaack v. Clark* are not law at the present day. Firstly, the distinction drawn between goods really lost and not really lost, though important in the criminal law as to larceny,[5] is not important in the law of tort. The true distinction is between taking goods really lost merely to preserve them, and taking such goods with the intention of appropriation. In the first case the act is lawful: in the second it is a trespass. If, on the other hand, the goods

[1] 2 Bulstr. at p. 312.

[2] For this opinion there was authority in the Y.BB.; this defence was set up in Vandrick and Archer's Case (1591) 1 Leo. 221, but was overruled.

[3] (1875) L.R. 7 H. of L. at p. 766.

[4] Ibid at pp. 766-767.

[5] Pollock and Wright, Possession 180-184.

are not really lost, a person who takes possession of them has, in effect, taken them, and is therefore a trespasser.[1] Perhaps Coke meant this; but his language is not clear; and it is the more unfortunate as the question of losing and finding was never an averment which was traversable. It was mere introductory matter to introduce the conversion which was the gist of the action. Secondly, the most important difference between the law laid down in that case and the law of to-day is the denial that this action lies against a finder who refuses to deliver on request, and, a fortiori, against a bailee who similarly refuses. The extension of this action to these two classes of persons marked its final and decisive victory over detinue. It would seem that this extension took place in the latter half of the seventeenth century.

(*a*) *The finder.* It is clear from the entries in Rolle's Abridgment that, in the earlier half of the seventeenth century, this action did not lie against a finder of chattels who failed or who refused to deliver them. The two following entries, the first of which represents a case of 1373,[2] and the second a case of 1607,[3] make this clear:—"If goods are thrown into the sea by a storm, and a stranger takes them and delivers them to a servant of the owner for the profit of the owner, no trespass lies against him." "If a constable lawfully takes my goods into his possession to the use of the owner on a waiver of them by a felon, though he afterwards refuse to deliver them to me on demand, still no trespass lies against him, but detinue." But opinion was beginning to change in the latter half of the seventeenth century. A passage cited by Ames[4] from the "Compleat Attorney"—a book published in 1666—lays it down that "this action (trover) properly lies when the defendant hath found any of the plaintiff's goods and refuseth to deliver them upon demand; or when the defendant comes by the goods by the delivery of any other than the plaintiff." That this passage truly represents the law of that day is probable from the history of the law as to the extension of this action to the bailee. (*b*) *The bailee.* The cases of the sixteenth and earlier half of the seventeenth centuries deny that this action lies against a bailee because, as Coke said, "bailment makes a privity."[5] In other words, there is something contractual about the relations of bailor and bailee, and so a refusal to deliver on request must be regarded, not as an independent wrong for which an action of trespass on the case would lie, but as a breach of that contractual duty for which the law had provided an appropriate remedy—to

[1] Pollock and Wright, Possession 172.
[2] Rolle, Ab. *Trespass* Y. pl. 6.
[3] Ibid pl. 7.
[4] Essays A.A. L.H. iii 443.
[5] Isaack v. Clark (1614) 2 Bulstr. at p. 311.

wit detinue. Certainly as late as 1650[1] the fact that the defendant was a bailee, was held to be a sufficient reason for not allowing a bailor to sue him by this action, on his refusal to deliver; and we have seen that in the passage from the "Compleat Attorney" cited above, it is recognized that the action will not lie against a bailee. But in 1675, in the case of *Sykes v. Wales*, it was ruled by Windham, J., that "trover lyeth on bare demand and denial against the bailee."[2] Since this extension of the action involved a greater departure from principle than its extension to the case where a finder refused to deliver on request, it is probable that the extension to the finder was prior in date, and that the "Compleat Attorney" gives a true account of the law. The law as thus settled was accepted by Pemberton, C.J., and Jones and Th. Raymond, JJ., in 1682,[3] by Holt, C.J., in 1702,[4] and by Trevor, C.J., 1703.[5] Blackstone[6] could state quite generally that this action "can be brought against any man, who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owners, or refused to deliver them when demanded."

It is clear that the judges of the latter half of the seventeenth century were not so impressed as their brethren of the earlier half of that century with the importance of preserving the distinction between detinue and trover. But it should be noted that the result of their action was precisely that which Coke had anticipated. In effect, "every action of detinue became an action upon the case upon a trover because there was a denyer."[7] For most purposes trover superseded detinue; and it deserved to supersede it, for it was free from the possibility of wager of law,

[1] Strafford v. Pell (1650) Clayton 151 pl. 276—"It was holden that an action of trover doth not lie against a carrier if the goods be not delivered to the owner upon demand, for this declaration is of a trover, and supposeth a losing the goods, where the carrier hath them by delivery"; cp. Holsworth's Case (1638) ibid 57 pl. 99—"Where goods are delivered at first by the owner, and after detained upon demanding them, detinue lyeth, and not trover in that case"; to the same effect is Walker's Case (1647) ibid 127 pl. 227.

[2] 3 Keble 282; it may be noted that W. Shepherd in his book on Actions on the Case, published in 1675, gives at p. 14 the following instances of a conversion: "As where a man happeneth to get the possession of goods or cattel of mine by finding *or delivery of another or of myself*, or by the sale of them by one that hath no right to them or otherwise: and he that of these hath neither right of propriety nor right of possession in them, and he doth convey or deliver them over to another, or waste or consume them, or, after demand, refuse to deliver them to me, and convert them to his own use"; at p. 309, dealing with the statement in Isaack v. Clark that a denial cannot be a conversion, he says "it seems the contrary is held and practised at this day for law."

[3] "If a man hath my goods by my delivery to keep for me, and I afterwards demand them, and he refuses to deliver them, I may have an action of trover," Put and Hardy v. Rawsterne (1682) Th. Raym. 472.

[4] Skinner v. Upshaw (1702) 2 Ld. Raym. 752.

[5] Anon. 2 Salk. 655.

[6] Comm. iii 152.

[7] Isaack v. Clark (1614) 2 Bulstr. at p. 313.

and the same precision in pleading was not required.[1] It was only as the result of the reforms of the beginning of the nineteenth century that detinue began slightly to revive. It appeared from the case of *Wilkinson v. Verity*[2] that it might be possible to bring detinue on a bailment, when it was not possible to bring trover, by reason of the fact that trover was barred by the statute of limitation. This might happen because time ran, in the case of detinue sur bailment, from the refusal to deliver; whereas, in the case of trover, it ran from the conversion. On the other hand, it was pointed out in that case that, "when the action of detinue is founded upon a wrongful conversion of the property only, as it needs must when there is a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms, the statute would run from the time at which the property was first wrongfully dealt with."[3] The result is that at the present day no substantial difference can be drawn between detinue sur trover and the action of trover and conversion.[4]

We must now turn to the history of the process by which this action encroached on the spheres of replevin and trespass.

(ii) *The extension of the definition of the acts constituting a diversion of the use and benefit of the chattels, from the plaintiff to the defendant, sufficient to give rise to the action.*

We have seen that the essence of conversion is the dealing with the use and possession of chattels in a manner adverse to the plaintiff, and inconsistent with his right of dominion. There is thus a clear theoretical distinction between acts which would give rise to the actions of replevin or trespass de bonis asportatis, and acts which would give rise to the action of trover and conversion. In order to succeed in an action of replevin or trespass de bonis asportatis, the plaintiff must prove simply a taking from his possession. He must prove, in other words, that the defendant has done acts which infringe an actually existing possession. A conversion, on the other hand, is an infringement of the right to possession. In the case of some trespasses the difference is obvious. Suppose that A enters B's rooms and breaks his chairs.

[1] For wager of law see vol. i 305-308; for a plea which was held good in trover, which would have been bad in detinue for uncertainty, see Hartford v. Jones (1699) 2 Salk. 654; and cp. S.C. 3 Salk. 366; Bl. Comm. iii 152.

[2] (1871) L.R. 6 C.P. 206.

[3] Ibid at p. 210; cf. Beaumont v. Jeffery [1925] 1 Ch. at pp. 11-12.

[4] Clark and Lindsell, Torts (4th ed.) 256; and cp. Goodman v. Boycott (1862) 2 B. and S. 1, and Bristol and West of England Bank v. Midland Rly. Co. [1891] 2 Q.B. at p. 661, there cited; for other obsolete difference between the two actions see above n. 1.

His act is a trespass, but not a conversion. Suppose that A buys B's goods from X who has stolen them, and A refuses to deliver them to B when B requests him to do so—A's act is a conversion but not a trespass. The difference is less obvious in cases where the trespass amounts to an asportation; but none the less it exists. Thus, if A enters B's rooms and, as a practical joke, removes B's furniture into the street and leaves it there, in as much as he has done no act inconsistent with B's right to possession, there is no conversion. "Every asportation," said Channell, B., in *Burroughes v. Bayne*,[1] "is not a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or anyone else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand, the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." This view as to the relations between trespass de bonis asportatis and conversion followed that set forth in the earlier case of *Fouldes v. Willoughby*;[2] and it was accepted by the House of Lords in *Hollins v. Fowler*.[3] It set at rest a controversy as to the exact definition of these two torts, which had been caused chiefly by the manner in which the action of trover had encroached on the spheres of the actions of replevin and trespass, and, to some extent, by the manner in which the action of trespass had encroached on the sphere of the action of trover.

Of the encroachment of trover on the sphere of replevin I have already spoken.[4] We have seen that in 1770[5] it was decided that, when goods not properly seizable, were seized by a custom house officer, trover lay against him as well as replevin; and that this decision was held to mean that in all cases of wrongful distress trover could be brought instead of replevin.[6] We have seen that this extension of trover is not, as was pointed out in 1677,[7] altogether consistent with principle, because, if goods are distrained, no act is done inconsistent with the ownership or even with the possession of the plaintiff; and we have seen that this view commended itself to Holt, C.J.[8] However that may be, it is

[1] (1860) 5 H. and N. at pp. 305-306.
[2] (1841) 8 M. and W. 540.
[3] (1875) L.R. 7 H. of L. 757.
[4] Vol. iii 285-287.
[5] Tinkler v. Poole (1770) 5 Burr. 2657.
[6] Shipwick v. Blanchard (1795) 6 T.R. 298; Clowes v. Hughes (1870) L.R. 5 Exch. 160.
[7] Mires v. Solebay 2 Mod. at p. 244.
[8] Vol. iii 286 n. 9; Hartford v. Jones (1699) 1 Ld. Raym. 393.

now settled that trover lies. Probably the explanation of the fact that the law came to be settled in this way must be sought in the history of the way in which the sphere of the action of trover encroached on that of trespass de bonis asportatis.

It is, as we have seen, obvious that some trespasses can never amount to a conversion.[1] Merely to damage goods in another's possession can never be a conversion, nor has it ever been supposed that an action of trover will lie in such a case. It is in cases where the trespass amounts to a taking—in cases, in other words, in which there has been an asportation—that the doubt has arisen. There are several seventeenth-century cases in which it was laid down very broadly that trover would lie for a taking. Thus in 1601, in the case of *Bishop v. Viscountess Montague*,[2] it was found that J.S., bailiff to the defendant, had wrongfully taken the plaintiff's cattle as a heriot; and that the defendant had assented to the taking and had converted them. It was held that trover lay. Some of the judges held that the proper form of action was trespass, and that trover did not lie. But Anderson, C.J., and Warburton, J., held that, "although trespass lies, yet he may have this action if he will, for he hath his election to bring either. And as he may have detinue or replevin for goods taken by a trespass, which affirms always property in him at his election, so he may have this action: for one may qualify a tort, but not increase a tort." Similarly, in the case of *Basset v. Maynard*,[3] trover was allowed to be brought for a taking. In 1610, in the case of *Levison v. Kirk*,[4] there is a dictum to the effect that, "if a man take my goods, and lay them upon the land of A, a trespass or an action upon the case lieth against him who took them by the better opinion." In 1627, in the case of *Kinaston v. Moor*,[5] the court said, "although he take it as a trespass, yet the other may charge him in an action upon the case in trover if he will." Shepherd, in his book on actions on the case, says that Baron Henden, at the Gloucester assizes in 1642, uttered the astonishing dictum "that whatsoever is such an act for which trespass will lie is a conversion, to give the action upon the case upon a trover";[6] and in 1662 the court seemed to consider that if goods were carried away, the parties might always elect to bring trover.[7] In 1665, in the case of *Bruen v. Roe*,[8] this view was

[1] Above 403.
[2] Cro. Eliza. 824; Cro. Jac. 50.
[3] (1601) Cro. Eliza. 819.
[4] Lane at p. 68.
[5] Cro. Car. 89.
[6] At p. 309.
[7] "Action de trover et conversion nest forsque en nature de trespass, et quand biens soient prise per baron et feme il est en election del partie a port action de trespass, vel action sur le case sur trover et conversion," Hodges v. Sampson (1662) W. Jones, 443.
[8] 1 Sid. 264, "Fuit tenus per Curiam sur le verdict que si en trover et conversion un actual prisel del biens etc. est done en evidence, ceo est assets bone sans provant

followed; and it was taken by the writer of the note on trover in Salkeld, which comes from the very end of the seventeenth century.[1] In the eighteenth century the current of authority ran even more strongly in the same direction. In 1756, in the case of *Cooper v. Chitty*,[2] Lord Mansfield said that "when the defendant takes these [the goods] wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action [trover], waives the trespass, and admits the possession to have been lawfully gotten"; and, as we have seen, it was his decisions which finally settled that trover, like trespass, could be brought instead of replevin for a wrongful taking.[3] Blackstone also seems to have thought that trover would in all cases lie for an unlawful taking.[4] Serjeant Williams, in his note to Saunders' report of the case of *Wilbraham v. Snow*,[5] summed up these authorities in the statement that, "whenever trespass for taking goods will lie; that is, when they are taken wrongfully, trover will also lie; for one may qualify but not increase a tort." It is not surprising that this dictum, thus supported, secured a following in the nineteenth century. Thus in 1831, in the case of *Norman v. Bell*,[6] Parke, J., said, "A plaintiff may always bring an action of trover when an action of trespass de bonis asportatis would lie"; it would seem that Martin, B., in *Burroughes v. Bayne*,[7] and *Hollins v. Fowler*[8] was inclined to take a similar view; and it secured the adhesion of Sir John Salmond.

There are, no doubt, several reasons which can be adduced in favour of this view. Firstly, we have seen that the notion of what constituted a conversion had been extended. The idea that the defendant must have permanently diverted the plaintiff's property to his own use had long been lost sight of. A mere temporary user, if inconsistent with the plaintiff's right to possession, was enough; and a refusal to deliver on demand was evidence of a conversion.[9] But, it might be said, if a refusal to deliver on

un demand et denial, come le prisel de mon bonnett de mon test, car ceo est actual conversion, mes lou chose vient per trover la doet este actual demand etc."

[1] 3 Salk. 365. [2] 1 Burr at p. 31.

[3] Vol. iii 286; above 415.

[4] "If a man take the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury . . . for which an action of *trespass vi et armis* will lie; or if committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*," Comm. iii 150.

[5] 2 Williams Saunders 47.

[6] 2 B and Ad. at p. 192. [7] (1860) 5 H. and N. at p. 303.

[8] (1872) L.R. 7 Q.B. at p. 616—"But as regards the action of trover I think it is well settled that the assumption and exercise of dominion—and asportation is an exercise of dominion—over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person"; see the criticisms of Brett, J., on this dictum in S.C.L.R., 7 H. of L. at pp. 780-783.

[9] Above 412-413.

demand is evidence of a conversion, a fortiori a taking, which amounts to an asportation, must be a conversion. We can see this line of reasoning in 1665 in the case of *Bruen v. Roe*.[1] Secondly, one of the reasons given for allowing trover to be brought for a taking is that a man "may qualify, but not increase a tort." In other words, a man may waive the trespass which was the more serious offence, admit that the defendant got possession without trespass, and ask that the wrong done to him by the refusal to recognize his right to possession be redressed. At all periods analogies and modes of thought, derived from the real actions and the land law, have been used to explain the law relating to the personal actions and chattels personal.[2] This influence may be suspected in this mode of reasoning. Just as a man was allowed to elect to consider himself disseised, so as to get the benefit of the remedies for disseisin without having been actually disseised,[3] so a man should be allowed to admit that he had not been dispossessed by a trespass, so as to enable him to sue by the action of detinue or trover.[4] Thirdly, we have seen that, even in the Middle Ages, it had been recognized that the forms of action were to some extent convertible.[5] This tendency to make them convertible increased in strength throughout the seventeenth and eighteenth centuries. Not only was trover allowed to be used when trespass would have been the more appropriate remedy, but we shall see that, conversely, trespass was allowed to be brought in place of trover.[6] In so far as this tendency to make these actions convertible prevented a plaintiff with a good case from losing his action by a mistake in procedure, it was a healthy tendency. But it had its dangers. The different forms of action did correspond to substantial differences between the wrongs which they were created to remedy; and too great a readiness to allow one form to be substituted for another tended to blur these substantial differences, and to confuse the principles upon which the law rested. Some of the dicta in these cases, and some of the statements of law founded upon them, suffered from this defect,

[1] 1 Sid. 264; see the passage cited above 416 n. 8.

[2] Vol. ii 590; vol. iii 152-153, 352; thus, for instance, in Isaack v. Clark (1614) 2 Bulstr. at p. 311 Croke, J., said, "Littleton in his chapter of Rents, saith, that a denyer shall make a disseisin, if it be so in real things a fortiori it shall be so in personals"; cp. Putt v. Roster (1682) 2 Mod. at p. 319, where serjeant Maynard, arguing as to whether a recovery in trespass is a good plea in an action of trover, uses an analogy taken from the relation of the different actions of formedon.

[3] Above 40, 41-42.

[4] "Et ausez on poit aver brief de Detinue, le quel prove que la properte n'est hors de luy s'il voille, mais il poit s'il voille porter action de Trespass; car il poit estre hors del properte s'il voil; *comme on poit estre disseisi de rent, s'il voille, per porter del Assize*, mes ceo est a son volunte," Y.B. 6 Hy. VII. Mich. pl. 4 (p. 8) *per* Vavisor.

[5] Vol. ii 454-455; iii 327-328, 349; above 404.

[6] Below 423-424.

because they ignored the fundamental difference which still existed between a conversion, even in its extended meaning, and an asportation.

Both in the seventeenth and eighteenth centuries there is authority for the proposition that an asportation does not necessarily amount to a conversion, and that, unless it amounts to a conversion, trover will not lie. We have seen that in 1677, in the case of *Mires v. Solebay*,[1] it was said that if no property was changed there could be no conversion, so that no action of trover would lie for a wrongful distraint. Again, in 1682, in the case of *Put v. Rawsterne*,[2] it was said that "sometimes the case may be such, that either the one or the other [action] will lie; as when there is a tortious taking away of goods *and detaining them*"—clearly the taking away is not by itself regarded as sufficient. Shepherd's book on actions on the case, published in 1675, indicates that the law was in an uncertain state; but his words show that it could not be broadly asserted that trover would lie whenever goods were taken.[3] We have seen that, in the eighteenth century, the tendency was to allow trover to be brought in every case where an asportation could be proved—to see, in other words, in every asportation a conversion.[4] But there is at least one authority in which a contrary view is expressed. In 1718, in the case of *Bushel v. Miller*,[5] the facts were as follows: On the customs house quay there was a hut, where porters deposited small parcels of goods brought on to the quay, if the ship was not ready to receive them. Each porter had a particular receptacle for this purpose in the hut. The plaintiff, one of these porters, had put in goods belonging to A in such a way that the defendant, another porter, could not get to his receptacle without moving them. He moved them about a yard from the place where they lay, did not put them back, and they were lost. Pratt, C.J., ruled that this asportation was no conversion. It will be found, moreover, that in most, if not all of the cases in which it was laid down that trover will lie for a taking, the taking was of such a kind as to amount to a conversion. Therefore the

[1] Vol. iii 286 n. 9; 2 Mod at p. 244; ibid at p. 245 it is said, "if a trover be brought for cutting trees and carrying of them away and the jury know that, though the defendant cut them down, yet they still lay in the plaintiff's close, this is no conversion"; this may be interpreted to mean that any trespass, if coupled with an asportation, is a conversion; but, as cutting the trees necessarily involves some asportation, it may be taken to mean that such taking is not necessarily a conversion.

[2] Th. Raym. 472.

[3] "*It is held by some* that *in most cases* where a man hath taken my goods into his possession as a trespass, so that trespass lieth for the wrong . . . that if I will I may demand the things; and if the party refuse to deliver them, that there be a conversion in the case," at p. 28.

[4] Above 417.

[5] 1 Stra. 128.

broader propositions to be found in them are merely dicta; and the statements made by Blackstone[1] and serjeant Williams,[2] which are founded upon these dicta, are entitled to no greater weight.

It was therefore open to the courts, in the second quarter of the nineteenth century, to follow the line of cases in which it had been held that, inasmuch as the essence of conversion consists in an intention to deprive the plaintiff of his right to possession, every asportation does not necessarily amount to a conversion. We shall see, when dealing with the history of consideration,[3] that at that period there was a tendency to scrutinize more carefully the nature of, and requisites for success in, the different forms of action. In other words, there was a reaction from the somewhat looser reasoning and almost pointed disregard for those old differences, which had characterized many eighteenth-century decisions. It is not surprising therefore that in 1841, in the case of *Fouldes v. Willoughby*,[4] the principle that every asportation does not necessarily amount to a conversion should be finally recognized. In that case the defendant removed horses belonging to the plaintiff from a ferry boat of which the defendant was manager. The plaintiff brought trover; and the question was thus raised whether the defendant's removal of the horses was a conversion for which this action would lie. It was held that it was not. Alderson, B., said, "Any asportation of the chattel for the use of the defendant or a third person amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times and in all places I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of a chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, when a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but on the contrary recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that

[1] Above 417.
[2] Ibid.
[3] Vol. viii 381.
[4] 8 M. and W. 540.

inconsistent with the general right which the plaintiff has to the use of the horses?" As we have seen, this exposition of the law has been accepted by the House of Lords.[1] It may therefore be said to have fixed on a logical basis the definition of acts necessary to constitute a conversion for which this action can be brought. Historically, as we have seen, the delay in the final settlement of this definition was largely due to differences of judicial opinion as to the extent to which trover could be allowed to encroach on the sphere of trespass. We shall now see that the almost equally long delay in the settlement of the rule that the plaintiff must prove a right to possession, which was absolute as well as immediate, was partly due to the same cause—the encroachment of trover on the sphere of trespass; and partly to the converse cause—the encroachment of trespass on the sphere of trover.

(2) The rule that the plaintiff must prove a right to possession which is both absolute and immediate.

The history of this rule falls under the following three heads: (i) The rule that a right to possession must be proved; (ii) The absolute character of the right; and (iii) The immediate character of the right.

(i) *The rule that the plaintiff must prove a right to possession.*

The action of trover, like the action of detinue, is an action to redress a wrong to the right to possession: the action of trespass, on the other hand, is an action to redress the violation of an actually existing possession. Therefore a person having a right to the possession of goods can sue by action of trover or detinue, but he cannot as a rule sue by action of trespass de bonis asportatis. For instance, if A takes B's goods and bails them to C, or if A takes B's goods and C takes them from A, B cannot bring trespass against C, though clearly he can, by virtue of his right to possession, bring detinue or trover.

The principle is clear enough; but it has been somewhat obscured by the manner in which trespass has in certain cases been allowed to encroach on the sphere of trover. We have already seen that it is many times emphatically asserted in the Year Books.[2] But, as it is the foundation of our modern law which determines the respective spheres of trover and trespass, and as it is the basis of the rule that to succeed in trover the plaintiff must prove a right to possession, I shall cite one or two additional passages from them in order to show the strictness with which it was adhered to. In

[1] Above 415.

[2] Vol. iii 323, 348.

1462 Nedham, J., said,[1] "there is a diversity when a man who has the custody of my goods gives them to another, and when a stranger takes them out of the possession of him who has the custody of them, and gives them to another; for in the first case the property (i.e. the possession) was in me, so that he who takes them by virtue of the gift of him who has no property (i.e. possession) in them, shall be adjudged a trespasser to me, but in the second case the property was out of me at the time of the gift and in him who gave them." In 1498[2] it was argued by Fineux that, if the purchaser of goods leaves them in the custody of the vendor, the purchaser has both property and possession by virtue of the sale, and can therefore bring trespass against the vendor if he detains them, or against a purchaser or bailee from him. But the court denied this, and it was said that "when a man comes by the goods by lawful means as by a delivery of the plaintiff immediately, he shall never be punished as a trespassor, but by writ of detinue; no more shall his donee, purchaser, or bailee who comes to the goods of the plaintiff by like means: but if one take them of his own wrong out of the possession of him who has come by them by lawful means, that is, takes them directly from him, he shall be punished as a trespassor." In 1505[3] Fineux, C.J., and Tremayle, J., said, "if I bail goods to a man, and he gives them to a third person or sells them; if the third person takes them without livery, he is a trespassor, and I shall have writ of trespass against him; for it was not by the gift or sale that the property (i.e. possession) was changed, but by the taking: but if he delivers them to the purchaser or donee, then I shall not have writ of trespass." It follows, therefore, that trespass de bonis asportatis could only be brought by the man who had had actual possession of goods, against the man who had taken these goods out of his possession.

But, even in the Middle Ages, some slight modifications of the rigidity of this principle had been admitted. (i) We have seen that, as early as in Edward II.'s reign, a bailor was allowed to bring trespass against one who had taken goods from his bailee, provided that the bailment was not for a fixed term;[4] and this is still the law.[5] (ii) In Henry VI.'s reign the court inclined to the view that administrators, and a fortiori executors, could sue by writ of trespass for the asportation of the goods of the testator between the death and the grant of administration or probate, though they were not in actual possession of the goods when the trespass was committed.[6] This also is still the law.[7] (iii) It

[1] Y.B. 2 Ed. IV. Pasch. pl. 9 p. 5.
[2] Y.B. 16 Hy. VII. Mich. pl. 7.
[3] Y.B. 21 Hy. VII. Mich. pl. 49.
[4] Vol. iii 348.
[5] Pollock and Wright, Possession 166; Pollock, Torts (12th ed.) 376.
[6] Y.B. 18 Hy. VI. Mich. pl. 7, cited Tharpe v. Stallwood (1843) 5 M. and Gr. 764.
[7] Tharpe v. Stallwood.

would seem from the Year Book of 21 Henry VII. cited above[1] that, even in case of a gift or a sale, possession would not pass without delivery so as to entitle the donee or the purchaser to bring trespass. But in that case Rede, J., thought that, if my bailee gave goods to another and the donee took them, I could not bring trespass against the donee, because his taking was as lawful as if the bailee had bailed them to him. He does not say that the donee of the bailee could bring trespass; but already we can see that the opinion of some was inclining to the view that a sale, and possibly a gift, of goods in a distant place, would give the donee sufficient possession to enable him to bring trespass.[2] because, like the bailor, he had an immediate right to possession. This view was upheld in 1628 in the case of *Hudson v. Hudson.*[3] In that case trover was brought by the plaintiff, an executor, against the defendant, for a conversion which had taken place after the death of the testator, and before the property had come into the actual possession of the plaintiff. The plaintiff recovered, and the court followed the dicta of Laicon in Edward IV.'s reign and Brudenel in Henry VIII.'s reign, and said that it was "as if a man in London gives me his goods in York, then if another takes them I shall have trespass." We shall see that it is probable that this is not law at the present day, unless the gift is by deed;[4] and even if the gift is by deed, or if there is a sale, so that the property has passed, it is doubtful whether the donee or the purchaser has sufficient possession to maintain trespass, unless, from the circumstances of the transaction, it can be inferred that the donor or vendor has agreed to hold possession as agent of the donee or purchaser.[5]

Nevertheless these cases, in which a person has been allowed to bring trespass, though not in actual possession, have been made the foundation of a theory that a mere right to possession will entitle a plaintiff to bring trespass alternatively to trover. The chief authority for this very wide proposition is serjeant Williams, who, in his notes on Saunders,[6] says, "he who has the absolute or general property may support this action (trespass)

[1] Above 422 n. 3.

[2] Y.B. 2 Ed. IV. Mich. pl. 26—"*Laicon* Jeo pose que jeo done a vous mes biens queux sont a Everwike, et devant que vous seisi, un estranger eux enprent, n'avez vous bref de trespass vers l'estranger? oil Sir, car per le done maintenant le property fuit en vous, et le possession per le breve est adjuge en vous maintenant"; but Laicon "videns opinionem curiæ contra eum passe oustre"; Y.B. 14 Hy. VIII. Hil. pl. 7 (p. 23) Brudenel, C.J., seems to be of this opinion, as he says, "Si jeo done a vous mon cheval noir que est in Londres, or vers chescun estranger le possession est en vous, et si ascun luy prend, vous aurez action de Trespass."

[3] Latch 214.

[4] Below 508-509; cp. vol. iii 357-358.

[5] Pollock and Wright, Possession 188-189.

[6] Note to Wilbraham v. Snow 2 Williams Saunders 47; cf. Pollock and Wright, Possession 145-147.

although he has never had the actual possession; for it is a rule of law that the property of personal chattels draws to it the possession, so that the owner may bring either trespass or trover at his election against any stranger who takes them away."[1] But, as Pollock and Wright have shown, the authorities which he cites do not bear out this wide proposition. In fact serjeant Williams laid down the rule as to when trespass can be substituted for trover as much too widely as he laid down the rule as to when trover can be substituted for trespass. The true rule, which represents both the principle laid down in the Year Books, and the modifications allowed in the Year Books and the later cases, is thus stated by Pollock and Wright.[2] "It is submitted that the correct view is that right to possession, as a title for maintaining trespass, is merely a right in one person to sue for a trespass done to another's possession; that this right exists whenever the person whose actual possession was violated held as servant, agent, or bailee under a revocable bailment for or under or on behalf of the person having the right to possession; and that it does not exist for the purposes of trespass and theft, as distinguished from trover or detinue, when the person whose possession was violated was not in any way a delegate or representative of the person having the right to possession, nor when the thing was not in any possession at all." This principle is implicit in the earlier authorities; but it had never been clearly stated till the learned authors published their book on Possession in 1888.

(ii) *The right to possession must be absolute.*

What then is the nature of this right to possession which the plaintiff in an action of trover must prove? Is it an absolute right, that is, a right good as against all the world such as a plaintiff in ejectment must prove,[3] or is it merely a better right than the defendant who is in possession? Or, putting the same question from the point of view of the pleader, we can state it in this way—can the defendant meet the plaintiff's claim by pleading a jus tertii through which he does not claim? It is clear that if the point at issue in the action is merely the question of whether plaintiff or defendant has the better right, such a plea is wholly immaterial; but that if the point at issue is the absolute right of the plaintiff; if, that is, the plaintiff must prove a right good as against all the world, the proof of such a plea is material, for it negatives the plaintiff's absolute right by showing that the right is in another person.

[1] It is possible that Blackstone was of the same opinion, see the passage from Comm. iii 150 cited above 417 n. 4.

[2] Possession 145-146.

[3] Above 62-64.

We have seen that in the Middle Ages, it is probable that the plaintiff out of possession, who wished to recover his chattel from the possession of the defendant, need only show a better right.[1] We shall see that in our modern law this is not always true.[2] We shall see that, in some cases, the plaintiff in an action of trover must, like a plaintiff in an action of ejectment, prove an absolute right; and that the mediæval law on this point has come to be modified in the case of chattels, in much the same way as it has been modified in the case of land. But the process of modification has been slow; and it is not till the nineteenth century that the principles of our modern law have been quite clearly ascertained.

In the Middle Ages the actions provided to protect the owners and possessors of chattels were mainly actions in tort.[3] Trespass was a quasi-criminal action; and the guilty defendant could be punished for his wrong as well as mulcted in damages.[4] It is clear that a plaintiff who complained of a trespass to his goods, whether that trespass consisted of damage to the goods or their asportation, could not be met by the plea of a jus tertii; for, unless the defendant could show that that jus was really his own, or in some one for whom he acted or under whom he claimed,[5] unless, that is, the jus was not really jus tertii, its existence was no excuse for the tort which he had committed; and this is as true to-day as it was in the Middle Ages.[6] The action of detinue was more proprietary in character than the action of trespass. But in detinue sur bailment the question hardly arose, as, if the bailment were proved, and the bailee were still in possession, he could not dispute his bailor's title;[7] while, if he were not in possession, he was, as we have seen,[8] absolutely liable to his bailor. The question therefore of the existence of a jus tertii was immaterial. It was probably equally immaterial in an action of detinue based upon a trover or a devenerunt ad manus. The issue in such an action was the detention by the defendant of goods, formerly in the plaintiff's possession, which had come into the defendant's hands in the manner suggested by the plaintiff. It would be open for the defendant to show that the goods were his own, or that he was acting on behalf of the owner; but it is difficult to see how the existence of a jus tertii could negative the

[1] Vol. iii 89-90, 337, 352-353, 359.
[2] Below 427-429.
[3] Vol. iii 319 seqq.; below 437-440.
[4] Vol. ii 364-365; vol. iii 323.
[5] Thus in 1482 Catesby *arg.* said—"En trespass des biens emports il n'est pas plee a dire que le property fuit a un autre homme sans faire title a luy, come a dire que le property fuit a un J.E. que eux baila al plaintif, apres que il eux done al defendant, or que jeo per son commandment ou come son servant eux prist, et issint de faire justificacion en son person ou de faire title," Y.B. 21 Ed. IV. Pasch. pl. 7.
[6] Vol. iii 337; below 426, 429.
[7] Y.B. 7 Hy. VI. Pasch. pl. 3 *per* Martin.
[8] Vol. iii 343-344; below 451.

right of the plaintiff to get back the possession of goods in which he had an older and therefore a better right to possession than the defendant. At any rate it never seemed to have occurred to any lawyer that it would be a possible plea; and this is perhaps the best evidence that it would have been inadmissible.

Originally the action of trover was, as we have seen, purely an action of tort. The gist of the action was a conversion. Originally therefore the plea of jus tertii would clearly have been admissible only on the same conditions as it was admissible in an action of trespass; and the same rules applied where trespass was allowed to be brought in place of trover. Indeed, if the law had been otherwise, it would, to a large extent, both have negatived the usefulness of the permission to bring trespass in such cases, and have contradicted the principle upon which that permission was based; for it would have put the person on whose behalf possession was held in a worse position than the possessor, instead of giving him the advantage of possession.[1] In the converse case also, where trover was brought instead of trespass, the same rule was followed. The case of *Armory v. Delamirie*[2] is decisive on this point; and indeed the rule there laid down follows from the root principle of the common law of possession, that the possessor is prima facie owner, and has all the rights of an owner except as against one who can show a better right.[3]

Would it then be true to say that the jus tertii is never pleadable to an action of trover? If this were the case, it would follow that the law did not recognize any absolute right of ownership, but merely, as in the Middle Ages, relatively good and relatively bad rights to possession. As we shall now see this is not the case. At the end of this period we can see the beginnings of the idea that, if a plaintiff in an action of trover is relying, not on his possession, but on his right to possess, the defendant could, like a defendant in ejectment in similar circumstances,[4] meet his claim by proving a jus tertii. In other words, the plaintiff must prove an absolute right good as against all the world. This development is probably due to the fact that the extension of the idea of conversion, and the consequent expansion of the action of trover, brought into prominence its possessory and proprietary aspects, at the expense of its older delictual aspects. It is significant, at any rate, that we do not get any clear signs of the rule that the plaintiff must prove an absolute right, till this development of the action had taken place. We have seen that it was at the end of the seventeenth century that this development was rapidly approaching completion. But, as late as the last year of

[1] Above 406.
[2] (1721) 1 Str. 505.
[3] Vol. iii 89-90, 359; below 449-450.
[4] Above 64-67.

that century, the case of *Hartford v. Jones*[1] would seem to show that Holt, C.J., knew of no case in which the defence of jus tertii had been specially pleaded. No doubt he would have admitted that the defence that the goods were not the property of the plaintiff could be given in evidence on a plea of not guilty; for both the discouragement of the practice of specially pleading this fact, and the admissibility of this evidence, were vouched for by cases of the earlier half of the sixteenth century,[2] which were apparently approved by Periam, J., in *Vandrink and Archer's Case* in 1591.[3] But all these cases leave it quite uncertain whether the defendant must show that he had a better right than the plaintiff, or whether it would be sufficient if he showed that some third person, unconnected with him, had a better right than either.[4] We have seen that there was a similar uncertainty in the case of the action of ejectment;[5] and, on the whole, I am inclined to think that in trover, as in ejectment, the mediæval view that the plaintiff need only prove a better right than the defendant prevailed; and that therefore the proof by the defendant of a jus tertii, through which he did not claim, was not a good plea.

But certain cases, which turned on the pleas admissible in an action of replevin, show that, towards the end of the century, opinion was beginning to change. According to one report of the case of *Wildman v. Norton*,[6] the court held in 1673 that, to an action of replevin, the defendant could plead in bar that the

[1] (1699) 2 Salk. 654.

[2] "Et si l'action fuit quod cum querens possessionatus fuit etc. ut de bonis propriis et le defendant eux trova et ceux convert en son propre use, il n'est ple quod querens non fuit possessionatus ut de propriis, mes direra non culp'al misdeamenour, et donera en evidence quod non fuerunt bona querentis et tamen verum quod non culp'erga eum," Bro. Ab. *Action sur le Case* pl. 109, 33 Hy. VIII.; "Action sur cas cum querens possessionatus fuit de tiels biens ut de propriis, et illa perdidit, et defendens illas invenit et ils in usum proprium convertit, le defendens dit que le pleintif eux gagea a luy pur xli: per quod ipse illa detinet pro dictis xli, prout ei bene licuit, absque hoc quod illa convertebat in usum suum proprium prout etc., et bone ple per aliquos, tamen per alios il pled non culp, et donera cest mater in evidence pur le deteiner," ibid pl. 113, 4 Ed. VI.

[3] 1 Leo at p. 223. In that case the defendant pleaded that, before the loss of the goods alleged by the plaintiff, they were in the possession of one C ut de bonis propriis, who sold them to the defendant, and that the defendant, before he had any notice that they were the goods of the plaintiff, and before any demand by the plaintiff for their delivery, sold them to persons unknown. This was a plea of a jus tertii through which the defendant claimed; and it was obviously bad, as it practically admitted that the plaintiff's right was better than that of C.

[4] Thus Windham, J., said, 1 Leo. at p. 223, "He (the defendant) confesseth the conversion, but hath not conveyed unto himself a sufficient title to the goods by which he might justifie the conversion; for the plaintiff declares of a conversion of his own goods, and the defendant justifies because the property of the goods was in a stranger who sold them to him, *which cannot be good title to have without a traverse*, unless he had shewed that he bought them in an open market, and then upon such matter he might well have justified the conversion."

[5] Above 62-63.

[6] 2 Lev. 92; the other report of the case, 1 Ventr. 249, says that the defendant pleaded that the beasts were his own property.

beasts were the property of a stranger. In 1693, in the case of *Butcher v. Porter*,[1] the court decided that the fact that the goods were the property of a stranger could be pleaded either in bar or in abatement. In 1704, in the case of *Presgrave v. Saunders*,[2] the same decision was given; and, according to Lord Raymond's note, Pengelly said,[3] that it was "all one to the plaintiff who has the property, if he has none; and it has been so adjudged lately, though formerly it was held otherwise," with which argument Salkeld, the other counsel for the defendant, agreed, and to which the court acceded.

Since about this time a similar development was taking place in the action of ejectment,[4] it is not surprising that it should also take place about this time in the parallel action of trover. In 1697 in the case of *Dockwray v. Dickenson*,[5] it was held that, when trover was brought for a ship and cargo, the defendant could, in mitigation of damages, show that the plaintiff was the owner of one sixteenth part only; and this decision clearly amounts to a right to set up a jus tertii—the right of the owners of the other fifteenth sixteenths—for the purpose of mitigating damages. In fact, in 1702, only three years after Holt, C.J., had made the statement in *Hartford v. Jones*[6] above referred to, he seems to have quite changed his mind as to the admissibility, in at least one case, of a special plea; and, further, to have ruled that a jus tertii could, in other cases, be given in evidence upon a plea of not guilty. In the case of *Blainfield v. March*[7] he ruled that, "where an administrator brings trover upon his own possession, the defendant may give in evidence a will and an executor, upon not guilty; otherwise if it be on the possession of an intestate (as in the principal case), for then the defendant ought to plead it in abatement, and, if he does not, he shall not give it in evidence." Here, therefore, were two cases in which a defendant could avail himself of a jus tertii either by his evidence on a plea of not guilty, or by a special plea. It followed, logically, that the property which the plaintiff must prove in an action of trover was, like the property which he must prove in an action of ejectment, an absolute property—a jus in rem. In fact it is probable that this new conception of property, as an absolute right as against all the world, arose more or less simultaneously in the three actions of ejectment replevin and trover. We see the beginnings of it in all three actions at about the same period; but in trover, as in ejectment,[8] it was not worked out to its logical conclusion till the nineteenth century.

[1] 1 Salk. 94.
[2] 2 Ld. Raym. 984.
[3] At p. 985.
[4] Above 63.
[5] (1697) Skin. 640.
[6] (1699) 2 Salk. 654.
[7] (1702) 1 Salk. 285.
[8] Above 64-67.

In 1756, in the case of *Cooper v. Chitty*,[1] Lord Mansfield emphasized the rule that the plaintiff in trover must prove property. But it was not till the decision in *Leake v. Loveday*,[2] in 1842, that the consequence of this rule was logically applied, and the defence of a jus tertii was allowed on principle to be always admissible in cases when the plaintiff is relying only on his right to possess. In that case A, in 1837, bought the goods of B, and allowed B to remain in possession of them till 1839, when B became bankrupt. B's assignees in bankruptcy did not claim the goods, and B retained possession till 1841, when the sheriff, under a fi. fa., seized and sold them. B's assignees then gave notice of their claim to the sheriff, who handed over the goods to them. A then brought trover against the sheriff. It was held that the sheriff could plead the jus tertii of the assignees. Tindal, C.J., said,[3] "the action is trover, to which the defendants have pleaded not guilty, and that the plaintiff was not possessed of the goods as his own property; and the question is, whether, under the latter plea, the title of third persons may be set up. It seems to me that from the very form of that plea, the plaintiff is called upon to prove the goods to be his property, and that the defendants are let into any evidence, which will show that such goods are not the plaintiff's."

The fact that the principle was not applicable either to the case of bailment, or to the case where the defendant in trover had got possession of the goods in a manner which involved some trespass against the plaintiff, no doubt tended to make the cases to which it was applicable more rare, and so to retard its recognition. As with the rule as to when trespass can be substituted for trover,[4] so with this rule, both the rule itself and the limits of its application were for the first time clearly stated by Pollock and Wright in their book on Possession. "Existing possession, however acquired, is protected against any interference by a mere wrongdoer; and the wrongdoer cannot defend himself by showing a better title than the plaintiff's in some third person, through or under whom he does not claim or justify. . . . On the other hand, a plaintiff who seeks redress solely for wrong done to his right to possess is not favoured to the same extent. If his actual possession has not been disturbed by the act complained of, he may be defeated by showing that someone else, who need not be the defendant or anyone through whom the defendant claims, had a better right to possess."[5]

[1] 1 Burr. 20; at p. 31 he said, "Two things are necessary to be proved to entitle the plaintiff to recover in this kind of action: 1st property in the plaintiff; and 2dly a wrongful conversion by the defendant."

[2] 4 Man. and Gr. 97 n. [3] At p. 981. [4] Above 424.

[5] At p. 91; as the authors say, "for the purpose of considering and applying decisions under the common law system of pleading, or the modified but still formal

Thus, through the working of the action of trover in the case of chattels, just as through the working of the action of ejectment in the case of land, the idea of ownership as right as against all the world, and not merely a better right to possession as against the defendant, was introduced into the common law. But the action itself "does not decide any question of ownership."[1] It decides merely the right to possession as between plaintiff and defendant. Therefore, as we shall now see, it gives no protection to the rights of owners as such. It only protects those owners if they have an immediate right to possession.

(iii) *The right to possession must be immediate.*

The rule that the plaintiff must show an immediate right to possession was not peculiar to the action of trover. The plaintiff in trespass must show that the defendant had taken the chattels out of his possession. We have seen, however, that in the fourteenth century, the scope of the action had been extended by allowing a bailor to bring trespass against one who had taken the chattels from his bailee.[2] But it is probable that the limitations of the bailor's rights were not at once ascertained. It is possible that in Henry VI.'s reign a bailor, who had pledged the goods to the bailee, could not bring trespass;[3] and, as we have seen,[4] it was laid down in *Isaack v. Clark*[5] that such a bailor could not bring detinue or trover. This involves the proposition that a bailor, who has no immediate right to possess, cannot bring trespass or trover. Hence it follows that, if the bailment was for a term, the bailor could not sue. Thus it was said by Hale that if "A have a special property in goods, as by a pledge or a lease for years, and the goods be stolen, they must be supposed in the indictment the goods of A."[6] Effect was given to this view in 1685, when, in the case of *Bedingfield v. Onslow*,[7] it was held that a reversioner could not bring trespass for an injury to his reversion. It is possible

system of the Common Law Procedure Act—that is down to 1875—we must always examine whether the cause of action did or did not in fact include some act amounting to trespass if not justified. When it does not include any such act, and then only, the plaintiff must succeed on the merits of his right to possession . . .; and he will fail if his case discloses, or the defendant can prove a better right elsewhere," Pollock and Wright at pp. 91-92.

[1] Clerk and Lindsell, Torts (4th ed.) 260. [2] Vol. iii 348.

[3] Y.B. 10 Hy. VI. Mich. pl. 86; Ames, Essays A.A. L.H. iii 424; but cp. Bordwell, Property in Chattels, H.L.R. xxix 518, who doubts whether the case is really an authority for this proposition.

[4] Above 408-409. [5] (1614) 2 Bulstr. 306.

[6] P.C. i 513; Mr. Bordwell, op. cit. 518, regards this as the first clear statement of the modern rule as to trespass; and probably he is right, cp. Pollock and Wright, Possession 145, where the confusion of the earlier authorities is noted; but that the rule is right in principle is there demonstrated, ibid 145-146.

[7] (1685) 3 Lev. 209; the fact that the authorities there cited are by no means conclusive is an argument in favour of Mr. Bordwell's view, see last note.

that this rule was partly "the outcome of the tendency to draw more sharply the line between trespass and trespass on the case,"[1] partly the outcome of the idea that trespass to chattels was a purely possessory action. At any rate it is clear that the decisions of the seventeenth century, if not those of an earlier date, were all tending in this direction. Thus the way was prepared for the modern rule laid down in *Ward v. Macaulay*[2] in 1791, and in *Gordon v. Harper*[3] in 1796. In *Ward v. Macaulay* Lord Kenyon held that A, having let his house furnished to B, could not maintain trespass against a sheriff who had taken the furniture under an execution against B, with notice that it belonged to A. In *Gordon v. Harper* it was held that trover could not be maintained under similar circumstances. Ashhurst, J., said,[4] "in order to maintain trover the plaintiff must have a right of property in the thing and a right of possession, and unless both these rights concur, the action will not lie."

This brings us to the consideration of the question of the limitations upon the sphere of trover, and the extent to which a plaintiff, who cannot sue by action of trover, may yet be entitled to another remedy.

The Limitations upon the Sphere of Trover

The action of trover was an action on the case invented to supplement the defects of the action of detinue. We must not therefore expect, in the fifteenth and earlier part of the sixteenth centuries, to find it very clearly distinguished from other actions on the case. It is not till the conditions under which it could be brought began to be settled, that it became a distinct species of action, clearly distinguishable from other innominate actions on the case. We have seen that the conditions under which the action could be brought were beginning to be settled in the latter part of the sixteenth century.[5] It is therefore at this period that this process of differentiation begins. Because the case of *Isaack v. Clark*[6] settled some of the conditions under which the action could be brought, it also brought into prominence some of the limitations upon its sphere. The judges in that case found that, in order to explain the conditions under which the action of trover would lie, they must distinguish other cases

[1] H.L.R. xxix 517; cp. Holmes, Common Law 172-173. [2] 4 T.R. 489.

[3] 7 T.R. 9; for a good illustration of the application of this doctrine see Horwood v. Smith (1788) 2 T.R. 750; but it should be noted that Parke, B., in Manders v. Williams (1809) 4 Ex. at p. 343, was doubtful whether the decision was wholly in accordance with principle; as we have seen, it was in accordance with the tendency of the previous decisions; but Baron Parke's doubt illustrates, as Mr. Bordwell has said (H.L.R. xxix 517), the fact that there had been a departure from the older authorities.

[4] 7 T.R. at p. 12. [5] Above 405-408. [6] (1614) 2 Bulstr. 306.

which, if remediable at all, were remedied by the action of detinue or by some other action upon the case.[1]

The limitations upon the sphere of the action necessarily centre round the two main points to be proved in the action—firstly the conversion, and secondly the nature of the right of the plaintiff.

(1) We have seen that to constitute a conversion a positive act of misfeasance was necessary.[2] We have seen that, by means of the rule as to demand and refusal, a large meaning was given to the acts which would amount to such a positive act of misfeasance.[3] But we have seen that this meaning was never extended so as to cover, either a mere failure to deliver by a bailee or finder, or damage done by them to the goods by negligence or accident.[4] Such acts do not constitute and never have constituted a conversion for which this action can be brought. But it does not follow that a bailor or other owner damaged thereby has no remedy. Since, however, the development of the law on this point, as applied to the bailee, differs somewhat from its development as applied to the finder, it will be necessary to consider their respective positions separately.

(i) *The bailee.*—We have seen that, in the Middle Ages and later, a bailee who failed to redeliver the goods bailed was absolutely liable to the bailor; and that his liability was enforced in an action of detinue.[5] We have seen also that he could not be made liable in that action if he restored the goods in a damaged condition; but that, at the end of the fifteenth century, this defect in the action of detinue was remedied by the growth of an action on the case.[6] We have seen that it is to this species of action on the case that we must look for the origin of the action of trover.[7] But, in the sixteenth century, when the conditions under which trover lay began to be defined, it was distinguished from it. "Ill and negligent keeping of goods," being only a non-feasance, could not, as Coke pointed out, amount to a conversion.[8] It was therefore remediable by an action on the case and not by an action of trover. Similarly an act which, though unauthorized under the contract of

[1] See the judgment of Dodderidge, J., 2 Bulstr. at p. 309, and the judgment of Coke, C.J., at p. 312, cited below n. 8.

[2] Above 406-407. [3] Above 412-413.

[4] Isaack v. Clark (1614) 2 Bulstr. at pp. 312, 314; Owen v. Lewyn (1672) 1 Ventr. 223; Anon. (1696) 2 Salk. 655; Ross v. Johnson (1772) 5 Burr. 2825; Williams v. Geese (1837) 3 Bing. N.C. 849; Heald v. Carey (1852) 11 C.B. 977; above 406-407.

[5] Vol. iii 337-338, 341-344; below 457.

[6] Vol. iii 350. [7] Ibid 350-351.

[8] "If a man findes goods an action upon the case lieth for his ill and negligent keeping of them, but no trover and conversion because this is but a non feasans," Isaack v. Clark (1614) 2 Bulstr. at p. 312; this clearly also applies to a bailee, "If a man delivers writings in a box to I.S. an action on the case lyeth if he abuse them," ibid at p. 309 *per* Dodderidge, J.

bailment was not wholly repugnant to it, was redressible by action on the case and not by trover.[1] Therefore, as the law stood at the beginning of the seventeenth century, a bailee was absolutely liable in detinue if he did not redeliver the goods; he was liable in an action of trover if he converted the goods, and a failure to restore on request was evidence of such a conversion; and, if he damaged the goods by his negligence or other wrongful act not amounting to conversion, he could be made liable by means of an action on the case.

During the course of the seventeenth and later centuries the bailee's position was modified by two sets of causes. In the first place, we shall see that the growth of the idea of negligence as a foundation of civil liability, modified his older absolute liability to redeliver to his bailor. We shall see that it came to be thought that he could not, as a general rule, be made liable for failure to redeliver to his bailor occasioned by no fault of his own.[2] On the other hand, it was recognized that he might by his contract make himself absolutely liable. In the second place, a greater stress was laid on the contractual element in bailment. This was largely due to the development of the action of assumpsit. We have seen that that action was originally an action in tort.[3] Indeed, one of the earliest instances of the use of the action was a case in which it was used to get damages from a negligent bailee;[4] and we have seen that it could always be used for this purpose.[5] But we have seen also that, as it developed, it became *par excellence* the action by which simple contracts were enforced.[6] Hence the fact that it was used to enforce the duties of bailees tended to emphasize the contractual element in bailment. This fact was beginning to emerge in 1536. "Note," runs the Year Book,[7] "that Fitzherbert drew a distinction between the case where one comes to the possession of goods by bailment, and the case where he comes to their possession by finding. For where one comes to their possession by bailment, there he is chargeable by force of the bailment, and if he bails them over, or they are taken out of his possession, yet he is chargeable to his bailor by force of the bailment: but it is otherwise when one comes to the possession of goods by finding, for then he is not chargeable except by reason of his possession, and if he has justifiably lost possession (*s'il soit hors del possession loialment*), before the person having the right to possession brings his action, he is not chargeable. To which Shelley agreed." The fact that bailment thus

[1] Lee v. Atkinson (1610) Yelv. 172; and cp. the remarks of Blackburn, J., in Donald v. Suckling (1866) L.R. 1 Q.B. at pp. 614-615.
[2] Below 452-453. [3] Vol. iii 429-434. [4] Ibid 430.
[5] Ibid 448-450. [6] Ibid 451-453. [7] Y.B. 27 Hy. VIII. Pasch. pl. 35.

came to be regarded as essentially contractual in its nature, enabled the older law as to the rights and duties of bailees to be modified, partly by the agreement of the parties, as *Southcote's Case* in 1601 recognized,[1] and partly by the growth of rules of law relating to particular contracts of bailment. The latter process was carried out on an extensive scale by Holt, C.J., in 1704 in the case of *Coggs v. Bernard*,[2] which is the starting point of the modern law of bailment.

(ii) *The finder.*—We have seen that the finder acted justifiably if he merely preserved the goods for the owner. But we have seen that if he converted them, e.g. by selling them or by unjustifiably refusing to restore them when asked to do so, he could be made liable in an action of trover;[3] and that if he detained them from the true owner he could be made liable in an action of detinue sur trover or sur devenerunt ad manus.[4] Similarly, it was recognized in the case of *Isaack v. Clark*[5] and other cases,[6] that he could be made liable in an action on the case for "ill and negligent keeping." But, as the Year Book of 1536 recognizes, he was not liable if he was "hors del possession loialment,"[7] in other words, if he ceased to have possession without being guilty of conversion and without negligence. This is still the law, as the court of Exchequer decided in 1853 in the case of *Crossfeld v. Such*.[8] Nor could a person under these circumstances be made liable for a conversion by reason of a demand or a refusal to deliver; for, as Parke, B., pointed out in *Edwards v. Hooper*[9] "there cannot be an effectual demand and refusal unless the party has at the time possession of the goods, and has the means of delivering them up."

We have already seen that the scope of the action of trover is limited by the fact that the plaintiff must prove that the defendant has been guilty of an act inconsistent with his rights of dominion over the chattel; and that therefore it does not follow that a trespass, even if that trespass amounts to an asportation, can be remedied by this action.[10]

(2) The plaintiff must prove a right to possession which is both absolute and immediate.[11] Both the necessity of proving a right to possession, and the necessity of proving the immediate character

[1] 4 Co. Rep. 83b; see below 452 n. 5.
[2] 2 Ld. Raym. 909.
[3] Above 406, 413.
[4] Vol. iii 349.
[5] Above 409 and n. 5.
[6] Above 432 n. 4.
[7] Above 433.
[8] 8 Exch. 825; it is of course otherwise if a defendant has "improperly parted with" the chattels, Jones v. Dowle (1841) 9 M. and W. at p. 20 *per* Parke, B.; in such a case the defendant might be made liable in detinue ibid, or in trover, if the improper parting with possession amounted to a conversion.
[9] (1843) 11 M. and W. at p. 367.
[10] Above 420-421.
[11] Above 424-431.

of that right, afford two further instances of the limitations upon the scope of this action.

(i) The plaintiff must prove that he had as against the defendant the better right to possession. It follows from this that, if two persons owned chattels in common, so that both were equally entitled to their possession, and one took possession of them, the other had no remedy by this action. Littleton had stated the principle clearly in the fifteenth century;[1] and as at that date the action of trover had only just begun to be developed, he was probably thinking of the actions of trespass, replevin, and detinue. But the principle was equally applicable to trover; and that this truth was recognized by Coke can be seen from the fact that he repeats Littleton's statement in a shorter form.[2] In later law, however, two modifications of this rule have been introduced. In the first place, it was decided as early as 1564 that, if one tenant in common of land leased his part to the other for years, the lessor might sue the lessee for waste.[3] In 1697-1698 Holt, C.J., ruled at nisi prius that, if there were two tenants in common of a tree, "and one cuts the whole tree, though the other cannot have action for the tree, yet he may have an action for the special damage by this cutting."[4] From these authorities Lord Kenyon, in 1799, deduced the general principle that, "if one tenant in common misuse that which he has in common with another, he is answerable to the other in an action for misfeasance."[5] In the second place, Coke, following the dicta in a Year Book case of 1374,[6] had laid it down that, if one tenant in common totally destroyed the property, the other could bring action of trespass against him.[7] But, as Coke said elsewhere,[8] such destruction would clearly amount to a conversion; and so it was decided in 1715, in the case of *Barnardiston v. Chapman*,[9] that in such a

[1] "But if two be possessed of chattels personals in common by divers titles as of an horse an ox or a cow etc., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take them from him who hath done to him the wrong to occupy in common etc., when he can see his time etc.," § 323.

[2] "If one tenant in common take all the chattels personal the other hath no remedy by action, but he may take them again," Co. Litt. 200a; Brown v. Hedges (1709) 1 Salk. 290.

[3] Moore (K.B.) 71 pl. 194.

[4] Waterman v. Soper (1697-1598) 1 Ld. Raym. 737.

[5] Martyn v. Knowllys (1799) 8 T.R. at p. 146.

[6] Y.B. 47 Ed. III. Mich. pl. 54.

[7] "If two tenants in common be of a dove-house, and the one destroy the old doves whereby the flight is wholly lost, the other tenant in common shall have an action of trespass. . . . And so it is if two tenants in common be of a park, and one destroyeth all the deer, an action of trespass lieth," Co. Litt. 200a, b.

[8] Ibid 57a.

[9] Cited 4 East 121; but it would seem that a sale by one tenant in common of a chattel would not amount to conversion, unless the result of the sale was to deprive the other of his interest in it, as e.g. in the case of a sale in market overt, note (*c*) to Wilbraham v. Snow 2 Wms. Saunders 47; Farrar v. Beswick (1836) 1 M. and W. at p. 658 *per* Parke, B., explaining Barton v. Williams (1822) 5 B. and Ald. 395.

case trover would lie. Perhaps analogies derived from the land law helped the development of these two modifications of the law in respect to the rights of tenants in common of chattels. The case reported by Moore is a case of waste; and Coke, as his illustrations show, was thinking of chattels connected with land such as a flight of doves or deer in a park.

(ii) It was decided in the nineteenth century that, though an owner who had no immediate right to possession, because e.g. he had let his chattel for a term, could not bring trover, yet he might sue by special action on the case for a permanent injury to the chattel.[1] Here too we may perhaps suspect that this development was partly due to the influence of the land law. That influence helped the courts to realize that there could be a reversionary interest in a chattel, of a sufficiently proprietary character to entitle the owner to an action on the case for permanent damage to it. Probably in the Middle Ages and later such an interest would have been regarded as a mere chose in action, which gave the person entitled no proprietary right at all, but only a remedy in personam against the lessee or bailee.[2] Partly perhaps it was due to the change in the legal position of the bailee alluded to above.[3] If he was not in all cases absolutely liable, it was only fair that his bailor should have some remedy for any damage which he had suffered.

Thus, by means of the action of trover and these other actions which supplemented it, the rights of owners and possessors of chattels were very adequately protected. Trover, and to some extent these other actions in tort, had developed into actions which protected these possessory and proprietary rights. Naturally this development had some effect both upon the nature, and the relations inter se, of trover and these other supplementary or cognate personal actions. With this matter I shall deal in the following section.

The Nature and the Relations inter se of the Actions of Trover and the other supplementary or cognate Personal Actions

The action of trover was and is a delictual action; but it had developed, as we have seen, into an action for the protection of the ownership and possession of chattels. In other words, it had become a possessory or a proprietary action. Moreover, it approxi-

[1] Mears v. L.S.W.R. (1862) 11 C.B.N.S. 850; the same view was expressed by implication in Tancred v. Allgood (1859) 4 H. and N. 438; really it is a more or less logical extension of the rule, which is as old as the Y.BB. (vol. iii 348), that, in the case of a bailment at will, either bailor or bailee can bring trespass; this analogy was hinted at by Williams, J., in the former case at p. 854.

[2] Vol. iii 353; below 470-471, 522, 533-534. [3] Above 432-434; below 452-453.

mated so closely to the sphere of contract, that the pre-eminently contractual and quasi-contractual action of assumpsit could, in many cases, if the parties so desired, be brought instead of it.[1] The action, therefore, though originally a delictual action, had developed connections both with the law of property and the law of contract. Consequently its nature was never precisely determined; and in this respect it resembled some of those older personal actions which it to a large extent superseded. In fact, just as the action of ejectment acquired some of the characteristics of the real actions,[2] so the action of trover acquired some of the characteristics of the older personal actions; and, among other characteristics, it inherited something of their indeterminate character, which arose from the fact that they originated at a period when the modern divisions of substantive law into possession and property, tort and contract, had not arisen.[3] If, therefore, we would understand the reasons why the nature of the fully developed action of trover, and of the other actions which protected the possession and ownership of chattels, was never precisely determined, we must begin by looking at the evolution of law as to the nature of some of these older actions. We shall then be in a better position to understand the somewhat similar evolution of the law as to the nature of the action of trover, and the other personal actions supplementary or cognate to it. I shall therefore deal firstly with the older personal actions, and secondly with the action of trover.

(1) The nature of the older personal actions.

We have seen that the nature of the older personal actions of debt and detinue was by no means clearly defined. They contained at once contractual, delictual, and proprietary characteristics; and now one and now another characteristic predominated, according to the nature of the cases in which they were employed.[4] But, as the ideas of contract tort and property began gradually to take shape, and as the sphere of these actions began to be defined, the lawyers began gradually to think of them as falling primarily under one or more of these categories;[5] but they never fell wholly under any one of these categories. Thus we have seen that though the action of debt tended to be regarded as primarily contractual, it never wholly lost its proprietary characteristics;[6] and the phrasing of the writ retained also its primitive connection with the law of tort.[7] Detinue, on the other hand, tended to be regarded as primarily proprietary. The plaintiff complained that the defendant

[1] Below 442; vol. viii 92-97
[2] Above 17-19.
[3] Vol. ii 367-368.
[4] Vol. ii 366-367; vol. iii 420.
[5] Vol. vi 637-639.
[6] Vol. ii 368; vol. iii 420.
[7] Vol. iii App. I. B (1)

was detaining *his* property; and this proprietary characteristic of the action was emphasized by the fact that detinue could be brought against the executors of a deceased person in their representative capacity, notwithstanding the maxim *actio personalis moritur cum persona.*[1] At the same time it never lost either its delictual or its contractual characteristics. If it was brought on a devenerunt ad manus or on a trover, it was difficult to regard it as otherwise than either delictual or proprietary in its nature; while if it was brought on a bailment, it was difficult to regard it as otherwise than contractual or proprietary.[2] Moreover, its contractual characteristics were emphasized by its close similarity to the action of debt which it originally had and always retained;[3] and this connection with contract was strengthened when assumpsit became, in many cases, alternative to this form of the action.[4]

To the end the lawyers never quite made up their minds as to the nature of detinue. The proprietary nature of the action comes out clearly enough in the Year Books—it is there regarded as essentially an action to assert the right of the plaintiff to possession.[5] It was so regarded in the seventeenth century. The action, said Dodderidge, J., in *Isaack v. Clark*,[6] "implies property in the plaintiff"; and in 1738, in the case of *Kettle v. Bromsall*[7] it was pointed out that it was the only action in which the plaintiff could claim, not merely damages, but the recovery of the thing itself. "In trover only damages can be recovered; but the things lost may be of that sort, as medals pictures or other pieces of antiquity, . . . that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves. Which can only be done in detinue."[8] It was for this reason that it could only be brought for property which "could be specifically known and recovered."[9] On the other hand, it was intimately allied to the action of debt, which was, as we have seen, in many cases rather a contractual than a proprietary action. Both were personal actions; and being actions of a like nature, counts in debt and detinue could be joined.[10] In fact, when detinue was brought on a

[1] Vol. iii 579-580.
[2] For these two forms of detinue see ibid 324-328, 337.
[3] Vol. ii 366-367; vol. iii 420.
[4] Above 433; below 442; Holmes, Common Law 183-186.
[5] Y.B. 6 Hy. VII. Mich. pl. 4 (p. 9) *per* Brian, C.J.; vol. iii 325-327.
[6] (1614) 2 Bulstr. at p. 308; cp. Bishop v. Viscountess Montague (1601) Cro. Eliza. 824.
[7] Willes 118. [8] Ibid at p. 120.
[9] "In this action of detinue it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money corn or the like: for that cannot be known from other money or corn; unless it be in a bag or a sack, for then it may be distinguishably marked," Bl. Comm. iii 151; cp. Isaack v. Clark (1614) 2 Bulstr. at p. 308 *per* Dodderidge, J.
[10] Walker v. Needham (1841) 3 M. and Gr. at p. 561 *per* Tindal, C.J

bailment, it was as much a contractual as a proprietary action. But, as the bailment was not traversable,[1] no very substantial distinction could be drawn between the two forms of the action.[2] Thus it could be argued that all actions of detinue were contractual in their nature; and this view was taken in several cases.[3] On the other hand, if detinue was brought on a trover, it is difficult to see how it could be said to be contractual in its nature; and therefore other cases laid it down that it was an action in tort.[4] Moreover, just as the capacity of debt and detinue to be joined was used as an argument for its contractual nature, so the fact that the non-joinder of all the parties to the detention was not fatal to success in the action, was used as an argument for its delictual nature.[5] The judgment of Brett, L.J., in the case of *Bryant v. Herbert*[6] is a striking illustration of the double character of the action; for, after saying that it is "technically an action founded on contract," he went on to rule that "when persons are sued in detinue for holding goods to which another person is entitled, the real cause of action in fact is a wrongful act, and not a breach of contract, and the remedy sought is not a remedy which arises upon a breach of contract." At the same time the power which the Court now has[7] of ordering a defendant to deliver up the goods instead of paying their value, has emphasized its proprietary character.

The action was essentially a proprietary action; but it was also a personal action; and both the lawyers and the Legislature had gradually come to think that personal actions must be founded on either contract or tort. It was therefore inevitable that their opinions as to the nature of the action should conflict, as one or other aspect of the action predominated. In truth the action, like many of the substantive rules of the common law, possessed the vagueness which is characteristic of primitive law. This vagueness no doubt spells obscurity; but, as we can see from other departments of the common law,[8] it also spells flexibility and adaptability. Detinue could, by reason of these

[1] Brook, Ab. Detinue pl. 5, 3 Hy. IV.; vol. iii 327; Bateman v. Elman (1602) Cro. Eliza. 866; see Whitehead v. Harrison (1844) 6 Q.B. 423; Clements v. Flight (1846) 16 M. and W. 42.

[2] However, a doubt is expressed in a note to 3 M. and Gr. at p. 564 as to whether debt could be joined with detinue sur trover, as it could with detinue sur bailment.

[3] Walker v. Needham (1841) 3 M. and Gr. at p. 561 *per* Tindal, C.J.; Danby v. Lamb (1861) 11 C.B.N.S. at p. 426 *per* Erle, C.J., and at pp. 427-428 *per* Byles, J.

[4] Gledstane v. Hewitt (1831) 1 Cr. and J. at p. 570 *per* Bayley, B.; Bryant v. Herbert (1878) 3 C.P.D. at p. 391 *per* Bramwell, L.J.

[5] Broadbent v. Ledward (1839) 11 Ad. and El. 209.

[6] 3 C.P.D. at pp. 392-393.

[7] 17, 18 Victoria c. 125 § 78 (Common Law Procedure Act, 1854); see Clark and Lindsell, Torts (4th ed.) 256.

[8] See vol. v 480.

qualities of flexibility and adaptability, satisfy many of the needs of owners possessors or bailors; for it could protect proprietary or possessory rights against adverse claimants or mere wrongdoers, and the rights of bailors against their bailees. It was therefore possible to regulate by its means the many varied relations of a proprietary, delictual, or contractual character into which the owners or possessors of property are brought. Its indeterminate and "unscientific" character enabled it to respond to the complex and equally "unscientific" needs and facts of ordinary life. We shall now see that these same qualities were inherited by its successor the action of trover.

(2) The nature of the action of trover.

The action of trover was, as we have seen, an offshoot of trespass;[1] and as to the nature of the action of trespass there can be no question. It was obviously delictual, and, originally, semi-criminal in character.[2] Moreover, the form of trespass which was used to redress the taking away of goods—trespass *de bonis asportatis*—was the substitute for even more distinctly criminal remedies—the appeals of robbery and larceny.[3] It was very natural therefore that the offshoots of trespass should, at the outset, partake of its delictual characteristics. Indeed, from this point of view, it might almost be said that the spread of these actions on the case marked a reversion to that more primitive period in the history of the law, when most actions were of a more or less delictual character. Thus we have seen that the action of assumpsit was at first a purely delictual action,[4] and that the early forms of the action on the case based on a trover and a conversion were equally delictual in character.[5] If therefore we remember that detinue, in spite of its proprietary and contractual characteristics, always retained something of its primitive delictual character, it is clear that, in the Middle Ages, the actions which protected the ownership and possession of chattels were mainly of a delictual character. It was through the working of these delictual actions that the foundations of the modern law as to the ownership and possession of chattels were laid; and therefore, as we have seen,[6] the history of the origins of this branch of the law is intimately related to the law of crime and tort.

The fact that trover, and the other actions on the case which were supplementary to it, originated in the law of tort, prevented them from ever acquiring proprietary and contractual characteristics which entirely overshadowed their delictual characteristics. It is for this reason that, as the modern text-books show, the law

[1] Vol. iii 350. [2] Vol. ii 364-365; vol. iii 323. [3] Ibid 322-324.
[4] Ibid 429-434 [5] Ibid 350; above 405-407. [6] Vol. iii 360.

as to the ownership and possession of chattels is still intimately bound up with the law of tort. But nevertheless, as some of these actions on the case developed into distinct species, some of them gradually acquired contractual or proprietary characteristics, which, to a greater or a lesser degree, overshadowed their original delictual character; and no doubt this process was helped by the growing perception of the differences between contract, quasi-contract, and tort, which the lawyers of the latter half of the seventeenth century were beginning to show.[1]

The earliest of these actions of the case to acquire a distinct character was the action of assumpsit. We have seen that it became the contractual action of the common law; and that its clear separation from the delictual actions was marked by the decision, arrived at in the sixteenth century, that the maxim *actio personalis moritur cum persona* did not, as a rule, apply to it.[2] On the other hand, we have seen that it could be and was used as an action in tort.[3] And we shall see that its extension, at the end of the seventeenth century, to cover a part of the sphere occupied by trover; and its extension, at the end of the eighteenth century, to enforce the repayment of money where it was equitable that money should be repaid, created the law of quasi-contract, and thus gave it in many cases a semi-proprietary character.[4] But though assumpsit thus retained certain of its delictual characteristics, though in its application to the law of quasi-contract it acquired certain proprietary characteristics, its contractual quality was always its most distinct feature. Of all the actions on the case it departed the most markedly from its delictual origin. The other action on the case which acquired a distinct character—the action of trover—always retained a far closer connexion with the law of tort.

The most striking illustration of the fact that it continued to be regarded as an action in tort is the application to it of the maxim *actio personalis moritur cum persona.* Because the conversion was the gist of the action, and because conversion was regarded as a tort pure and simple, the action was never allowed to be brought against an executor or administrator. Cases of the sixteenth[5] and seventeenth centuries[6] laid this down very clearly; these cases were followed by Lord Mansfield in 1776 in the case of *Hambly v. Trott;*[7] and they are the basis of the modern law laid down by the court of Appeal in 1883 in the case of *Phillips v. Homfray.*[8] "There are express authorities,"

[1] Vol. vi 637-640.
[2] Vol. iii 451-452.
[3] Ibid 448-450.
[4] Vol. viii 92-97.
[5] Tooley v. Windham (1599) Cro. Eliza. 206; cp. Brian Tucke's Case (1598) 3 Leo. 241; Russel and Prat's Case (1590) 4 Leo. at p. 46.
[6] Baily v. Birtles (1663) Th. Raym. 71.
[7] 1 Cowper 372.
[8] (1883) 24 C.D. 439.

said Lord Mansfield,[1] "that trover and conversion does not lie against the executor. I mean when the conversion is by the testator. There is no saying that it does. The form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator." But Lord Mansfield hastened to add that "no mischief was done; for so far as the cause of action does not arise ex delicto, or ex maleficio of the testator, but is founded in a duty which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received." In fact, as we have seen, it was possible to enforce against an executor a duty to restore property taken by the testator by an action of detinue;[2] and, as we shall see, this duty had come to be better enforced by the expansion of assumpsit to cover much of the spheres occupied by both detinue and trover.[3] It was clearly this fact which induced the court in *Hambly v. Trott* to follow the older precedents, and to decide that trover was an action of so delictual a character that the maxim *actio personalis moritur cum persona* applied to it—"the criterion I go upon is this: can justice possibly be done in any other form of action?"[4] If it could not have been so done, it is quite possible that, just as the courts in the sixteenth century held that the maxim did not apply to assumpsit because it was pre-eminently contractual in character,[5] so the courts in the eighteenth century might have held that it did not apply to trover because it was proprietary in character.[6]

That it had come to be proprietary in character was fully recognized by Lord Mansfield both in *Hambly v. Trott* and in *Cooper v. Chitty*. In the former case he said that it was "in substance an action of property."[7] In the latter case he said "In form it is a fiction: in substance a remedy to recover the value of personal chattels wrongfully converted by another to his use."[8] And, in fact, its proprietary character had been growing more and more marked during the seventeenth and eighteenth centuries. This fact is apparent from the manner in which it was expanded so as to cover practically all, and sometimes more than all, the sphere of detinue.[9] It can be further illustrated, firstly, by the

[1] 1 Cowper at p. 377.
[2] Vol. iii 579-580.
[3] Vol. viii 92-97; cp. vol. iii 448-450.
[4] 1 Cowper at p. 373.
[5] Vol. iii 451-452.
[6] Thus, on the first argument in Hambly v. Trott, Lord Mansfield said, 1 Cowper at p. 373, "I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right"; and in his final judgment he pointed out, at p. 375, that "in most, if not in all cases when trover lies against the testator another action might be brought against the executor which would answer the purpose," and then he gives examples of cases in which the injured party could get a remedy by suing in assumpsit; cp. vol. iii 580-582.
[7] 1 Cowper at p. 374.
[8] (1756) 1 Burr. at p. 31.
[9] Above 405-414.

development of the law as to actions of trover by and against a married woman; and, secondly, by the development of the law as to the effects upon the rights of the parties to this action, to bring other cognate personal actions.

(i) *Trover by or against a married woman.*—The rules as to the conditions under which trover could be brought by or against a married woman grew up in the course of the seventeenth and eighteenth centuries. Many of them are somewhat minute rules of the pleading variety; but the principle which underlies them illustrates the double character—half delictual and half proprietary—which the action had assumed. In 1590, in *Marshes Case*,[1] its delictual character, and its difference from this point of view from the proprietary action of detinue, are emphasized. It was held in that case that it lay "against the husband and wife, and not against the husband only, for the action doth sound in trespass, and it is not like unto detinue; for upon a detainer by the wife the action lieth against the husband only." This view of its character was also taken in 1610 in the case of *Draper v. Fulkes*.[2] "This action," said Yelverton, J., "is not grounded on any property . . . but on the possession only, and the point of the action is the conversion, which is a tort with which a *feme covert* may be well charged, as well as she may be charged with a trespass or disseisin committed. And if a *feme covert* takes my sheep and eats them . . . I may well have this action against husband and wife, and suppose the conversion in the wife only, viz. the tort." But in 1610 the action was beginning to assume its proprietary characteristics. Therefore Yelverton added, "but husband and wife cannot have an action of trover, and suppose the possession in them both, for the law will transfer in point of ownership the whole interest to the husband"; and for this proposition he was able to cite a Year Book of Edward IV.'s reign.[3]

In fact the solution outlined by Yelverton was in substance that actually reached. A married woman could be guilty of a tort, and she could be damaged by a tort.[4] Therefore she could, jointly with her husband, be defendant[5] or plaintiff[6] in an action of trover. But she had no proprietary capacity. Therefore it was a fatal error if she and her husband were said to have converted the property to *their* use, or if a conversion committed

[1] 1 Leo. 312; cp. Baldwin v. Mortin (1589) Owen 48.
[2] Yelv. 165.
[3] Y.B. 21 Ed. IV. Pasch. pl. 7.
[4] Russel v. Corne (1704) 1 Salk. 119 and note; Smalley v. Kerfoot (1738) 2 Str. 1094.
[5] Rhemes v. Humphreys (1633) Cro. Car. 254; Perry v. Diggs (1638) Cro. Car. 494; cp. Smalley v. Kerfoot (1738) 2 Str. 1094; note to Wilbraham v. Snow 2 Wms. Saunders 47.
[6] Nelthorp v. Anderson (1693) 1 Salk. 114; note to Wilbraham v. Snow 2 Wms. Saunders 47.

against them was said to be to *their* damage. The conversion or the damage could only be attributed to the use of or be suffered by the husband.[1]

There is, it is true, in some cases of the seventeenth century a tendency to hold that, if trespass or trover were brought to assert a right to property, the wife could not sue or be sued,[2] to assimilate, in other words, actions of trespass and trover brought with this object, to the more truly proprietary actions of replevin[3] and detinue.[4] But, as we have seen, trover, and a fortiori trespass, were never regarded as truly proprietary actions. Their origin was never forgotten;[5] and therefore husband and wife could always sue and be sued in an action of trover, provided that the pleader was careful to assert that the damages were suffered by the husband, or to attribute the conversion to his use only. Thus this rule of pleading recognized, with the accuracy for which these rules of pleading are always distinguished, the mixed delictual and proprietary character of the action.

(ii) *The effects of bringing this action upon the right to bring other cognate personal actions.*—The question when a judgment or recovery in one action will be a bar to another action is a topic which has given rise to a vast mass of complicated rules, which have necessarily varied with the many changes which have taken place in the law of actions. In the Middle Ages and later the question was much complicated by the differences between the real and personal actions,[6] by differences between the various alternative real actions,[7] and by differences between the forms of the writs in the different kinds of real and personal actions.[8] But, throughout the history of this complex subject, we can see, beneath a maze of technical rules, the attempt to give effect to the

[1] The various exceptions to or modifications of this rule, which in this connection are immaterial, will be found in the note to Wilbraham v. Snow.

[2] Berry v. Nevys (1623) W. Jones 16; Powes v. Marshall (1664) 1 Sid. 172 *per* Hyde, C.J., and Kelynge, J.; cp. Blackborne v. Greaves (1674) 2 Lev. 107; Wittingham v. Broderick (1702) 7 Mod. 105.

[3] Brook, Ab. *Baron et Ferme* pl. 85 (33 Ed. III.).

[4] Marshes Case (1590) 1 Leo. 312; above 443.

[5] This was clearly pointed out by Twisden and Windham, JJ., who, in Powes v. Marshall (1664) 1 Sid. 172, dissented from the view of Hyde, C.J., and Kelynge, J.; they, "teign clarement que l'action fuit bien port per le baron et feme, car est diversity inter actions queux affirme property come repl', detinue etc., car ceux doint estre port in la nosme del baron sole, quia le property est affirme, et actions queux disaffirme property, come trespass trover, etc., car ceux doint estre port en ambideux lour nosmes, quia sont found sur le tort fait devant le coverture."

[6] Ferrer's Case (1599) 6 Co. Rep. 7a. [7] Ibid at f. 7b.

[8] Sparry's Case (1596) 5 Co. Rep. 61a—"But the old difference in our books is between writs which comprehend certainty as in debt detinue etc., and writs which comprehend no certainty as assise trespass etc. For it is true that in writs (be they real, personal or mixt), which are certain, it is a good plea to say, that the writ is brought pending another, but in writs real or personal, when no certainty is contained, there it is no plea."

principle "interest rei publicæ ut sit finis litium." Therefore the law has laid it down that "when one is barred in any action real or personal by judgment or demurrer, confession, verdict etc., he is barred as to that or the like action of the like nature for the same thing for ever." This principle was laid down by Coke in 1599,[1] and it was repeated by Lord Bowen in 1884.[2]

The manner in which this principle has been applied to the action of trover, and other cognate personal actions, illustrates the manner in which, what were originally purely delictual actions, have developed into actions which are possessory or proprietary in their nature. At the outset, as we have seen, trespass assumpsit and trover were purely delictual actions. From this point of view they differed from debt and detinue, which, as we have seen, had always had somewhat of a contractual or a proprietary character. They were not actions "of the same nature"[3] as trespass and its off-shoots; and therefore it did not follow that a judgment on a writ of debt or detinue would be any bar to suing out a writ of trespass or case. It would only be a bar if, as Coke pointed out in *Sparry's Case*, it was shown by the declaration in the second action that the same question was at issue.[4] Thus we have seen that some of the earliest actions on the case based on a trover were brought by the plaintiffs in actions of detinue against the defendants in those same actions, for damages to the goods detained.[5] Because the question at issue in the action on the case was not the same question as that which was at issue in the action of detinue, recovery in one action was no bar to pursuing the other. Thus in 1479 Catesby said,[6] "If you get from me my horse to ride to York, and you ride further to Calbrugth, I shall have a writ of detinue and recover the horse, and then I shall have action on my case, and recover damages for the use of the services of my horse outside the agreement. Similarly if I bail you my robes to keep safely, and you wear them so that they are worn out, I shall have action of detinue (for in all these cases there is no alteration in the property) and then I shall have action on my

[1] Ferrer's Case 6 Co. Rep. 7a; or as he expresses it in Sparry's Case (1591) 5 Co. Rep. 61a, "By the rule of law a man shall not be twice vexed for one and the same cause *nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa.*"

[2] Brunsden v. Humphrey (1884) 14 Q.B.D. at pp. 146-147.

[3] This phrase was used in Hudson v. Lee (1589) 4 Co. Rep. 43a, in the unsuccessful argument that a recovery in trespass was no bar to an appeal of mayhem.

[4] (1591) 5 Co. Rep. 61a.

[5] Vol. iii 350.

[6] Y.B. 18 Ed. IV. Hil. pl. 5; cp. Y.B. 12 Ed. IV. Mich. pl. 10, where Catesby contended that judgment in detinue was no bar to an action on the case—"Ceo n'est estoppel, car il n'est de meme le chose per que nostre action est conceive, car cest action n'est forsque pur le negligence del defendant per que le cheval morust, et le breve de detinue fuit port pur le detinue, et per ceo il suit pur recevoir le cheval, et issint coment que il fuit barre en le bref de detinue, il ne serra bar de cesty action d'un tort fait a luy, come s'il ust de baterie de son cheval, cest matter de detinue ne serra barre."

case, and recover damages for the loss which I have sustained by the user of the robes."

Clearly this reasoning tended to become less applicable as the sphere of both trover and assumpsit was enlarged to cover most of the ground formerly occupied by detinue. But naturally, as these enlargements were gradual, the courts only gradually appreciated the new position which these actions on the case were coming to hold. Thus, in 1599, Anderson, C.J., and Glanville, J., considered that a recovery in trespass was no bar to an action of trover, because they were of different natures; and they compared this case to the case where a man brought trespass, and afterwards detinue or account.[1] No doubt, in so far as they held that a nonsuit occasioned by bringing a wrong writ was no bar to a subsequent purchase of the right writ, their view was sound; and it was followed in subsequent cases.[2] But, as we shall see, in so far as they grounded their opinion exclusively upon the different natures of the actions, they were holding an opinion which was tending to become more and more obsolete. In the same case Walmseley, Kingsmill, and the other judges held the contrary, because in both actions the issue was the same—namely, the ownership of an ox. They therefore held the plea of judgment in the action of trespass was a good plea to the subsequent action of trover.[3] And this seems to have been the view of Coke, C.J., in *Isaack v. Clark*.[4] But in 1627, in the case of *Lacon v. Barnard*,[5] it was held that this reasoning would not apply if the question at issue in the two actions was not the same, so that judgment for damages recovered in an action of trespass for taking and driving sheep, was no answer to a later action of trover for converting the same sheep. The rule to be followed therefore turned on the question whether substantially the same right was at issue in both actions. This was apparently the rule laid down in 1682 in the case of *Putt v. Rawsterne;*[6] and, according to one report of that case, it was said that the proper criterion to be applied to settle this question was to ask whether the same evidence will support both actions.[7] The whole subject was fully considered in 1772 in the case of *Hitchin v. Campbell*, when this

[1] Ferrers v. Arden (1599) Cro. Eliza. 668.

[2] Putt v. Roster (1682) 2 Mod. 318; Hitchin v. Campbell (1772) 2 W. Bl. at p. 831.

[3] Ferrers v. Arden (1599) Cro. Eliza. 668.

[4] (1614) 2 Bulstr. at p. 312.

[5] Cro. Car. 35.

[6] 3 Mod. 2; S.C. sub. nom. Putt v. Roster 2 Mod. 318; Th. Raym. 472; 2 Shower K.B. 211; the reports are not altogether consistent, and it is said *arg.* in Hitchin v. Campbell (1772) 2 W. Bl. at p. 779 that the report in 2 Mod. 318 was incorrect; cp. Lamine v. Dorrell (1706) 2 Ld. Raym. at p. 1217 *per* Holt, C.J.

[7] "And the rule for this purpose is, that wheresoever the same evidence will maintain both the actions, there the recovery or judgment in one may be pleaded in bar of the other; but otherwise not," Th. Raym. 472.

principle was finally approved by De Grey, C.J., and Gould, Blackstone, and Nares, JJ.[1] Thus, whenever trover or assumpsit or detinue was brought to assert a possessory or a proprietary right, a judgment on the question at issue in one of these actions, would be an answer to any other of these actions, brought by the same parties to try the same issue. Thus it was finally recognized that these actions of trespass, trover, or assumpsit had come, in many cases, to be no mere actions in tort, but actions brought to determine possessory or proprietary rights.

Just as the mediæval law as to the ownership and possession of chattels was built up round the action of trespass and the older personal actions of debt and detinue, so the modern law on this subject has been built up round the actions of trespass and trover, and the other actions of trespass on the case which supplemented the action of trover. They, for the most part, took the places of the older personal actions of debt and detinue; and, in and through them, the mediæval law, which had grown up round the action of trespass and the older personal actions, was both applied, and, in the process, developed. These new actions on the case added new elements to the mediæval law of ownership and possession. They modified the mediæval theory in the case of chattels, in much the same way as the action of ejectment modified it in the case of land; and other additions and modifications were introduced by the growing elaboration of the rules of law relating to different kinds of chattels. With these developments, which have given rise to the modern law as to the ownership and possession of chattels, I shall deal in the ensuing section.

§ 2. The Ownership and Possession of Chattels

The modern principles which underlie the law as to the ownership and possession of chattels, began to be developed from their mediæval bases by the growth, during the sixteenth and seventeenth centuries, of the action of trover and the actions on the case subsidiary to it. This development was completed during the two following centuries; and, simultaneously, we can trace the development of the modern rules as to the acquisition and loss of ownership and possession. As the result of these developments, we can estimate the large effects which these principles have had upon many different branches of English law. I shall therefore deal with this subject under the three following

[1] 2 W. Bl. 829; and with this view Lord Eldon, C.J., agreed, Martin v. Kennedy (1800) 2 Bos. and P. at p. 71.

heads: The Theory of Ownership and Possession; The Acquisition and Loss of Ownership and Possession; The Relation of the law of Ownership and Possession to other Branches of the Common Law.

The Theory of Ownership and Possession

The modern principles of the law as to the ownership and possession of chattels adhere very closely to the mediæval principles. They are however both added to and elaborated. The main addition is the emergence of the modern conception of ownership; and elaboration necessarily comes as the principles are worked out into definite rules. Hence we can see some of the practical consequences of the common law theory of ownership and possession; and we can, as in the mediæval period, profitably compare and contrast the modern rules with the analogous modern rules relating to land. We must consider, therefore, (1) The modern principles; (2) some of the consequences of these modern principles; and (3) their differences from the principles applicable to land.

(1) *The modern principles.*

In the modern, as compared with the mediæval common law, we find a greater elaboration of, and some confusion in, terminology. Just as in the land law it was necessary to reconcile the rule that two persons cannot exclusively possess the same thing, with the fact that there might be many different classes of tenants of the same piece of land;[1] so in the law as to chattels personal, it was necessary to reconcile the same rule with the fact that such persons as servants or licensees, who have physical control, have not got possession.[2] To meet this situation we talk of the custody of the servant and the possession of the master, or of the servant having actual and the master constructive possession. Similarly, the extension of remedies like trespass, which primarily belong to the possessor, to the person who has only a right to possess, leads sometimes to the attribution of possession to both bailor and bailee.[3] In such cases it is clear that we have no infringement of the principle that two persons cannot exclusively possess the same thing; but rather a use of the term possession in the double sense of physical control and a right to possess. To this situation the phrases "actual possession" and "constructive possession" are also applied. In fact the terminology of the law relating to the possession of chattels is far

[1] Vol. iii 96.
[2] Ibid 363-365; below 461; Pollock and Wright, Possession 27.
[3] Ibid 21.

less precisely settled than the terminology of the law relating to the seisin or possesssion of land; and, as Sir F. Pollock has pointed out, much confusion has resulted from this cause.[1]

Turning from terminology to substantive principles, we find that they are essentially the same as the mediæval principles.[2] The only change is, as we might expect, a greater precision of definition owing to their constant reiteration throughout the centuries; and the main addition is, as I have said, the emergence of a new conception of ownership. The law as thus developed can be grouped under the following three propositions:

(i) The person in possession is treated as the owner save as against him who can show a better right to possession. As against all the world, except the man with the better right, he has all the powers of an owner.

This, as we have seen, was the principle of the mediæval law; it was adhered to all through this period; and it is still part of our modern law. Thus, in the seventeenth century, Coke said in *Heydon and Smith's Case*,[3] "A servant who is commanded to carry goods to such a place shall have an action of trespass or appeal. If after taking the goods, the owner hath his goods again, yet he shall have a general action of trespass, and upon the evidence the damages shall be mitigated. . . . That he who hath a special property in the goods at a certain time shall have a general action of trespass against him who hath the general property, and upon the evidence damages shall be mitigated; but clearly the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages, because that he is chargeable over." So Hale in his Pleas of the Crown[4] says, "if A bail goods to B to keep for him, or to carry for him, and B be robbed of them, the felon may be indicted for the larceny of the goods of A or B, and it is good either way for the property is still in A, yet B has the possession, and is chargeable to A if the goods be stolen, and hath the property against all the world but A." In the eighteenth century the case of *Armory v. Delamirie*[5] lays down the law equally emphatically. "The finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such

[1] "The whole terminology of the subject, however, is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context," Pollock and Wright, Possession 28.

[2] For these principles see vol. iii 351-359.

[3] (1611) 13 Co. Rep. at p. 69; and Coke goes on to point out that a similar principle was applicable to the land law, in that tenant at sufferance and tenant at will could both bring trespass "in respect of their possession," ibid; see above 422, 430, and cp. Elliott v. Kemp (1840) 7 M. and W. at p. 312 *per* Parke, B.

[4] i 513.

[5] (1722) 1 Stra. 505.

a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover." In the nineteenth century, in the case of *Jeffries v. The Great Western Railway Co.*,[1] Lord Campbell, C.J., said, "the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is title"; and the same principle was affirmed in 1901 in the case of *The Winkfield*.[2]

No one has ever questioned the application of this principle to the cases of the taker and the finder of goods. The authorities are unanimous that, as against all the world except the true owner, their possession gives them the position of owners. In fact any other rule would, as Lord Kenyon pointed out,[3] be "an invitation to all the world to scramble for the possession." It is the application of this principle to the bailee that has given rise to divergencies of opinion; and if we look at the historical development of his position it is not strange that this should be so.

We have seen that, in the twelfth century, English law, following continental law, gave to the bailee, because he was possessor, the rights of an owner as against all the world except his bailor.[4] The bailor, by reason of the bailment, had lost his real right to the chattel, and could only assert his better right by a personal action against the bailee. Conversely and consequently, the bailee was absolutely liable to his bailor. But, in the thirteenth century, under the influence, partly of Roman doctrines of ownership and possession, and partly of Roman doctrines as to the basis of liability, both parts of the older doctrine came to look a little anomalous. A bailee's position was different from that of a taker or a finder in that he acknowledged the better title of his bailor—was it reasonable therefore to allow him the rights of an owner by virtue of his possession? He was not even a possessor according to the rules of Roman law. Similarly, influenced by the rules of Roman law, Bracton had hinted at some relaxation of his strict liability. But though in cases of the fourteenth and fifteenth centuries there are dicta which point in the direction of some relaxation, these dicta never materialized.[5] Instead, the judges adhered to the idea, which had emerged in the thirteenth century, of rationalizing the rule that the bailee as

[1] (1856) 5 El. and Bl. at p. 805; as Williams said in his note to Wilbraham v. Snow 2 Wms. Saunders 47, "Possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrongdoer."

[2] [1902] P. 42.

[3] Webb v. Fox (1797) 7 T.R. at p. 397.

[4] Vol. iii 337-339.

[5] Ibid 341-342.

possessor had the right to sue as if he were an owner, by assigning as the reason for his right to sue the fact that he was liable over to the bailor.[1] Thus both his rights and his liability were accounted for; and this method of reasoning tended to stereotype both his absolute liability and his rights. As we have seen, the law was laid down in this way throughout the sixteenth century;[2] and, as we shall see, it continued to be so laid down in cases of the seventeenth, eighteenth and nineteenth centuries.[3]

It may seem that the question whether the rights of the bailee to sue as if he were owner are put on the ground that, as possessor, he has the rights of an owner; or whether they are put on the ground that he is liable over to the bailor, is not a question of very much practical importance. This, as we have seen, was true in the Middle Ages[4] and, to a large extent, down to the end of the seventeenth century.[5] Practically the only cases in which the bailee was not liable—cases in which the property was destroyed by the king's enemies or by the act of God[6]—were cases in which he was unable to sue anyone. It might well seem, therefore, that they confirmed the view that the bailee's rights to sue were correlative to and limited by his liability over. Moreover, the personal character of the actions in which he could be made liable, tended to concentrate attention on his liability, and to throw into the background his position as a possessor. There was no pressing need, therefore, to decide what was then an academic question; and so, during the seventeenth eighteenth and nineteenth centuries, the judges went on repeating the formula that the bailee can sue as a possessor because he is liable over. In the seventeenth century this reason is assigned for his rights of action in *Southcote v. Bennet*,[7] in *Heydon and Smith's Case*,[8] and in *Mors v. Slue*.[9] In the eighteenth century Blackstone so stated the law;[10] and similar statements were made in the nineteenth century both by Ellenborough, C.J.,[11] and by Erle, C.J.[12]

We have seen that *Southcote's Case* imported into modern law the view that the bailee is absolutely liable to the bailor, and can

[1] Vol. iii 342-344. [2] Ibid 344; above 432, 433. [3] Below nn. 7-12.
[4] Vol. iii 345. [5] Below 454. [6] Vol. iii 345.
[7] (1601) Cro. Eliza 815. [8] (1611) 13 Co. Rep. at p. 69; above 449.
[9] (1671-1672) 3 Keb. at p. 73 *per* Holt *arg.*
[10] "The tailor, the carrier, the innkeeper, the agisting farmer, the pawn-broker, the distrainer, and the general bailee may all of them vindicate in their own right, this their possessory interest, against any stranger or third person. For, as such bailee is responsible to the bailor, if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right to recover either the specific goods, or else a satisfaction in damages, against all other persons, who may have purloined or injured them; that he may always be ready to answer the call of the bailor," Bl. Comm. ii 453-454.
[11] Rooth v. Wilson (1817) 1 B. and Ald. at pp. 61-62.
[12] Swain v. Leach (1865) 18 C.B.N.S. at p. 486.

for that reason sue third persons who interfere with his possession.[1] But as I have already pointed out,[2] it is clear that, if and when his absolute liability is undermined, the question whether he can sue such persons because he is a possessor, or because he is liable over, will cease to be a merely academic question. If he is liable only for negligence, it may well happen that cases will arise in which he will be in a position to sue a wrongdoer who has destroyed or damaged the goods bailed to him, and yet will not be liable over to his bailor, because the damage or destruction cannot be attributed to his negligence. It will no longer be the case that the only instances in which he is not liable are instances in which there is no one whom he can sue. On the contrary, it may well happen that he is not liable, and yet there is a defendant who can be made liable to pay for damage to or destruction of the goods. Clearly in such a case his right to sue will depend on the question whether it rests upon his possession or upon his liability over. If it rests upon his possession he will have this right: if it does not he will not have the right, or, if he has it, he will be able to recover, not full damages, but only such damages (if any) as have been inflicted upon his interest as bailee.

Now even before the decision in *Southcote's Case*,[3] the absolute liability of the bailee was being indirectly undermined in different directions; and this process was rapidly proceeding during the century which intervened between the date of that decision (1601), and the date when *Coggs v. Bernard*[4] (1703) was decided. Firstly, bailees made special contracts with their bailors which excluded the rule of absolute liability.[5] Secondly, distinctions were drawn between various classes of bailees, e.g. between pledgees and carriers,[6] and between factors or servants and bailees.[7] Thirdly, on account of its procedural defects, there was a tendency to supersede detinue, either by actions on the case based on an assumpsit, or otherwise.[8] If a bailee was sued by such an action it must be shown that it was by his misfeasance or negligence that he had damaged the goods;[9] and when assumpsit came to be regarded

[1] (1601) 4 Co. Rep. 83b; vol. iii 344.
[2] Ibid 345.
[3] (1601) 4 Co. Rep. 83b.
[4] 2 Ld. Raym. 909.
[5] Y.B. 9 Ed. IV. Mich. pl. 22 *per* Danby, J.; cp. Mosley v. Fosset (1598) Moore 543; Coke in Southcote's Case, 4 Co. Rep. at f. 84a draws the moral that "it is good policy for him who takes any goods to keep to take them in special manner, *scil*, to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined that he shall not answer for them."
[6] 29 Ass. 163 pl. 28; "if goods are pawned or pledged to him for money, and the goods are stolen, he shall not answer for them, for there he doth not undertake to keep them but as he keeps his own," Southcote's Case (1601) 4 Co. Rep. 83b.
[7] Woodlife's Case (1596) Moore 462 *per* Popham, C.J.; S.C. Owen 57; Southcote's Case 4 Co. Rep. 84a.
[8] Vol. iii 448-450; above 413-414.
[9] Y.B. 2 Hy. VII. Hil. pl. 9; (1510) Keilway 160 pl. 2 *per* Moore, Serjt.; Williams v. Hide (1628) Palmer 548.

as prima facie a contractual action, the tendency to make the bailee's liability depend upon the terms of the contract was strengthened.[1] Fourthly, there was a tendency to differentiate between the liability of a paid and that of an unpaid bailee.[2] Most of these tendencies had been foreshadowed by the manner in which the bailee's position had been treated in the Doctor and Student. The Roman learning, with which the author was familiar, helped him to generalize and emphasize the tendencies which were already working in his day;[3] and the popularity and authority of the book helped to induce other legal writers to follow his lead,[4] and the judges to give effect to them.[5] Thus the ground was prepared for the elimination of the bailee's absolute liability by chief justice Holt in *Coggs v. Bernard;*[6] for, as Holmes has said,[7] the basis of the bailee's liability had been so variously stated during the sixteenth and seventeenth centuries, that it was difficult to discern the real principle upon which it rested.

[1] The process was beginning at the end of the fifteenth century; thus in Y.B. 2 Hy. VII. Hil pl. 9 there is an action on the case on an assumpsit for negligently guarding sheep; assumpsit was then as much an action in tort as contract; but it is clear that later an assumpsit against a bailee was regarded generally as a contractual action, see e.g. Rogers v. Head (1611) Cro. Jac. 262; Williams v. Lloyd (1629) W. Jones 179, where it was held that the death of a horse bailed, without the default of the bailee, would be a good answer to an action of assumpsit; below 454; cp. Mosley v. Fosset (1598) Moore 543.

[2] Woodlife's Case (1596) Moore 462; The King v. Hertford (1681) 2 Shower, K.B., 172 pl. 164.

[3] For this book see vol. v 266-269; The summary of the law on this topic will be found in Bk. ii c. 38, and the following extracts illustrate the writer's point of view: "In the said summe called *Summa Rosella* in the title *Casus fortuitus* . . . is put this case. If a man lend another a horse, which is called there *Depositum*, and a house by chance falleth upon the horse, whether in that case he shall answer for the horse. And it is answered there, that if the house were like to fall, then it cannot be taken as a chance, but as the default of him that had the horse delivered to him. But if the house were strong, and of likelihood and by common presumption in no danger of falling, but that it fell by sudden tempest, or such other casualtie, that then it shall be taken as a chance, and he that had the keeping of the horse shall be discharged." This diversity, it is said, "agreeath with the laws of the Realm." Similar principles are applied to loans for use. The question who is to bear the loss if the goods perish, depends on whether the bailee is in fault or not. On the other hand, he is absolutely liable to restore things lent for consumption, or if he has contracted so to be liable.

[4] Noy's Maxims cap. 43, cited Street, Foundations of Legal Liability ii 262 n.

[5] Thus Holmes thinks that Popham, C.J., borrowed his distinction between paid and unpaid bailees from this source, Common Law 181-182; cp. Maynard's argument in Williams v. Hide (1628) Palmer at p. 550.

[6] (1703) 2 Ld. Raym. 909.

[7] "Although that decision (Southcote's Case) was the main authority relied on for the hundred years between it and *Coggs v. Bernard* whenever a peculiar responsibility was imposed upon the bailees, we find that sometimes an assumpsit was laid as in the early precedents, or more frequently that the bailee was alleged to be a common bargeman, or common carrier, or the like, without much reference to the special nature of the tort in question. . . . They (the pleaders) also adopted other devices from the precedents in case, or to strengthen an obligation which they did not well understand. Chief Justice Popham had sanctioned a distinction between paid and unpaid bailees, hence it was deemed prudent to lay a reward. Negligence was of course averred; and finally it became frequent to allege an obligation by the law and custom of the realm," Common Law 187; as to the obligation by the law and custom of the realm see vol. iii 385-386, 448.

As the result of that decision the question of the basis of the bailee's right to sue became a practical question. But, though *Coggs v. Bernard* was decided in 1703, this question was not finally answered till 1901. The reasons why it remained so long unanswered were mainly two. Firstly, we have seen that in the fourteenth century bailors had got concurrent right to bring actions of trespass or detinue against persons who had damaged or destroyed their chattels while in the possession of bailees, unless the bailment was for a fixed term;[1] and that, subject to the same condition, they could always bring trover.[2] Clearly the bailor was the person who suffered most in cases where he could not sue his bailee. He was therefore the person most likely to take action; and so, in the majority of cases, the question was not raised. Secondly, the contractual aspect of bailment was emphasized by the extension of assumpsit to the field of detinue and trover.[3] The bailee might conceivably be absolutely liable to his bailor by the terms of his contract, as the Doctor and Student pointed out;[4] and in that case the question as to the basis of his right to sue wrongdoers could not arise.

When the question arose for decision for the first time, the judges held that the bailee's right to sue was due to his liability over to his bailor; and that, therefore, if he was not liable over to his bailor, he could not recover damages against a wrongdoer.[5] Having regard to the long line of cases in which the bailee's right to sue had been grounded upon his liability to be sued, the decision is quite intelligible[6]; it is not in itself unreasonable; and we shall see that the contrary decision gives rise to difficulties from which this decision is free.[7]

Nevertheless I cannot doubt that the reversal of this decision by the court of Appeal, in the case of *The Winkfield*,[8] was not only historically sound, but also in principle correct. In that case the court of Appeal decided that a bailee, by virtue of his possession, can sue for the full value of the goods, whether or not he is liable over to the bailor. This decision therefore removed the confusion as to the real basis of the bailee's rights which had been introduced, in the thirteenth century, under the transient influence of ideas drawn from the Roman law.[9] It

[1] Vol. iii 348-349. [2] Above 430.
[3] Vol. iii 448-450; above 442; vol. viii 92-97.
[4] "If a man have goods to keep to a certain day for a certain recompense for the keeping, he shall stand charged or not charged after as default or no default shall be in him, as before appeareth, and so it is if he have nothing for the keeping; but if he have for the keeping, and make promise at the time of the delivery to redeliver them safe at his peril, then he shall be charged with all chances that may fall," Bk. ii c. 38.
[5] Claridge v. South Staffordshire Railway Co. 1892 1 Q.B. 422.
[6] Vol. iii 345-346. [7] Below 461-463. [8] [1902] P. 42.
[9] Vol. iii 340-341, 343, 346, 347; above 450.

gave effect to the view, which Holmes had advocated,[1] that the bailee can sue because he is a possessor, and not because he is liable over. That the court of Appeal, in thus following Holmes, adopted the true historical view I have tried to show in an earlier volume.[2] That this view is also in principle correct is, in my opinion, conclusively demonstrated by Collins, M.R. "It is not open," he said,[3] "to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between these two parties full damages have to be paid without any further inquiry." This was clearly the law in the case of the finder. "But, if this be the fact in the case of the finder, why should it not equally be the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder?"

The law, as thus settled, was in conformity with the principles which had always been recognized in the case of land;[4] for, in the case of land, counsel had never been confused by the importation of the question of liability over. Having regard to the close parallelism between the root principles of the law as to ownership and possession of land and chattels, which has existed throughout their history,[5] we may regard this result of the decision as a final and a conclusive reason in favour of its correctness.

(ii) The owner out of possession has nothing save a right to recover his chattel from the possessor.

It follows from this rule that, during the Middle Ages and throughout this period, the owner had nothing which he could alienate inter vivos.[6] He had, as Coke explained in *Spencer's Case*,[7] merely a chose in action. The only relaxation of this rule

[1] Common Law, Lecture V.; the gist of his elaborate historical argument is contained in the following passage at p. 174—"The meaning of the rule that all bailees have the possessory remedies is, that in the theory of the common law every bailee has a true possession, and that a bailee recovers on the strength of his possession, just as a finder does, and, as even a wrongful possessor, may have full damages or a return of the specific thing from a stranger to the title."

[2] Vol. iii 346-347. [3] [1902] P. at pp. 55-56. [4] Above 46-48.

[5] Vol. iii 352-354; above 80-81; below 465 seqq.

[6] Ibid 353; below 522-523, 533; at first sight it may seem that in Y.B. 11 Hy. IV. Mich. pl. 46 we have the case of an owner selling goods in the possession of a bailee, below 462 n. 5; but it is not so, as the defendant's plea was that the bailor took them from the bailee and sold them to the defendant; the plea therefore illustrates the general rule.

[7] "In the case of a lease of personal goods there is not any privity, nor any reversion, *but merely a thing in action in the personalty*, which cannot bind any but the covenantor, his executors and administrators, who represent him," (1583) 5 Co. Rep. at f. 17a.

was the permission to release his rights to the person in possession. The view that he could thus release his rights was taken by Danby, C.J., and Nedham, J., in 1462; and it was justified on the ground that, just as a disseisee could release to the disseisor, so the owner out of possession could release to a trespasser.[1] Littleton admitted that a disseisee could release to a disseisor, but, apparently denied that the owner could release to the trespasser.[2] Of this opinion also was Brian, C.J.;[3] but the contrary opinion gained ground—the analogy of the validity of a release by a disseisee was too obvious. In 1590 the validity of a conveyance by an owner of chattels out of possession, to the person who had taken them, was admitted by Manwood, C.B.;[4] and, in the seventeenth century, the author of Shepherd's Touchstone[5] states that this is the law. And so, though the owner out of possession cannot make a grant to a stranger, he can release his rights to one who has taken them; for, as Preston explained in his edition of the Touchstone, the taker's "acceptance of them is an admission of property in the donor." "But they cannot be given to a stranger, since without such an admission, the party has merely a right of action or resumption by recaption."[6]

The owner still has merely a chose in action. No statute, like the statute of 1845 in the case of land,[7] has expressly enabled the owner to alienate his rights. His powers in this respect are governed by the conditions prescribed by the law for the alienation of choses in action; and we shall see that, owing to the delictual character of the owner's rights of action, owing to the rule that all choses in action were long unassignable, and owing to the rule that some choses in action arising from tort are still not assignable, doubts have long existed as to his rights to alienate.[8]

The capacity of the owner out of possession to alienate by will, and the manner in which he could exercise his right, were established at an earlier date. We have seen that the testamentary powers of the owner were regulated by the ecclesiastical courts and the canon law.[9] These courts followed the rules of

[1] Y.B. 2 Ed. IV. Mich. pl. 8; cp. Ames, Disseisin of Chattels, Essays A.A.L.H. iii 555.

[2] Y.B. 2 Ed. IV. Mich. pl. 8.

[3] Y.BB. 6 Hy. VII. Mich. pl. 4 at p. 9; 10 Hy. VII. Trin. pl. 13; but note that in the former case Vavisor, J., and in the latter case Keble, took the view of Danby, C.J., and Nedham, J., and differed from Brian, C.J.

[4] "If my goods be taken from me I cannot give them to a stranger, but if my goods come to another by trover, I may give them over to another (i.e. that other)," Russel and Prat's Case (1590) 4 Leo. at p. 46.

[5] At p. 240; for this book see vol. v 391-392.

[6] 6th ed. 241; this passage is cited by Ames, Disseisin of Chattels, Essays A.A.L.H. iii 556.

[7] 8, 9 Victoria c. 106 § 6; vol. iii 92.

[8] Below 521-523, 533.

[9] Vol. i 625-630; vol. iii 536 seqq.

the Roman law, which allowed a testator to bequeath anything owing to himself, provided that the right to sue for it arose from a cause of action which survived.[1] Thus Swinburne says[2] that, "Albeit by deed of gift made in the lifetime of any person to another of all his goods and chattels, debts or things in action do not pass; yet if the testator by his last will and testament do give and bequeath to another any debt due unto him, or a thing in action belonging unto him; the legacy is good and effectual in the law, and may be recovered in this manner: that is to say, if the testator do make the legatary executor of that particular debt or thing in action bequeathed: then the legatary as executor thereof may commence suit in his own name, and recover the same to his own use, against him by whom it was due. But if the testator do not make the legatary executor of the debt, or thing in action bequeathed: then his remedy lieth in the ecclesiastical court, where he may covent the executor, and compel him either to sue for that debt in a court competent, and upon recovery and payment thereof, to pay it over to the executor: or else to make a letter of attorney to the legatary for the recovery of the debt or thing in action bequeathed in the name of the executor to the use of the legatary." For this proposition he cites a passage of Justinian's Institutes, which states in very broad terms that a testator can leave as a legacy anything due to himself.[3] This statement of the law was then, and has always, been accepted both by the common law[4] and by equity[5]; and it is still the law. But it should be noted that in the case of testamentary alienation, as in the case of alienation inter vivos, the rights of owners of chattels out of possession (unlike the rights of owners of land out of possession) have not been added to by the Legislature. The clause of the Wills Act of 1837,[6] dealing with the property which could be disposed of by will, though it added to the powers of the owners of land, did not, it was held, add anything to the powers of the owners of chattels.[7] There-

[1] As to what actions survived see vol. iii 576-578, 584.

[2] A briefe Treatise of Testaments (ed. 1635) Pt. iii § 5.

[3] "Tam autem corporales res quam incorporales legari possunt. Et ideo et quod defuncto debetur potest alicui legari, ut actiones suas heres legatario praestet, nisi exegerit vivus testator pecuniam; nam hoc casu legatum extinguitur," Instit. 2.20.21.

[4] Perkins, Profitable Book § 527; Shepherd, Touchstone (6th ed.) 430, 431.

[5] Drew v. Merry (1701) 1 Eq. Cas. Ab. 175—a right to set aside a release on the ground of fraud was held to pass to the residuary legatee of goods and chattels; Anon. (1714) 1 P. Wms. 267-268 it was held by Cowper, L.C., that a debt by bond passed to a legatee; he said that it would do so at common law, and moreover that, being a will of personalty, it ought to be construed by the rules of the civil law.

[6] 7 William IV. and 1 Victoria c. 26 § 3.

[7] Bishop v. Curtis (1852) 18 Q.B. 878—Lord Campbell, C.J., said, "The Legislature did not intend to make any kind of personalty bequeathable which was not bequeathable before, but only, as regards that kind of property, to regulate the form

fore an owner's capacity to bequeath his right to a chattel still depends upon the principles of law which were laid down by the ecclesiastical courts; and they are based ultimately upon the rules of the Roman civil law.

Of the reasons for the different treatment by the Legislature of the power of dispossessed owners of land and of chattels personal to alienate I shall speak more at length later.[1] We shall see that we must look for one of these reasons to the different character of the actions which shaped their rights; and for another to the different range of their powers of disposition, which, partly as the result of this difference in the character of the actions, and partly as the result of the different physical qualities of land and chattels, existed in the Middle Ages,[2] and has continued to exist down to the present day. But these matters can be better discussed when we are considering the differences between the principles governing the ownership and possession of chattels and those applicable to land.

(iii) The owner out of possession, who seeks to recover his possession, must show an absolute right; so that, if the defendant in possession can show that some third person has a better right than either, the plaintiff cannot recover.

As we have seen, this rule was clearly laid down in the cases which determined the conditions under which trover lay.[3] As a similar rule was laid down in cases which determined the conditions under which ejectment lay,[4] it followed that, here again, the development of the law as to the ownership of chattels ran parallel with the development of the law as to the ownership of lands. In both cases the common law had come to recognize that ownership was an absolute right, that is a right as against all the world, and not merely the better right of a plaintiff as against a defendant to the possession.

These then are the modern principles applicable to the ownership and possession of chattels. We must now consider one or two of the legal consequences which flow from them.

(2) *Some consequences resulting from the legal principles governing the ownership and possession of chattels.*

We have seen that, in the case both of land and chattels, English law reached the conception of ownership as an absolute right, through developments in the law of possession.[5] But,

of executing wills. With respect to real estate, it does provide that some kinds not previously devisable, such as rights of entry, may be devised. But there is nothing to shew an intention of enabling a testator to bequeath a chose in action, so as to pass the right to sue."

[1] Below 524-525, 533. [2] Vol. iii 351-352.
[3] Above 426-429. [4] Above 64-67. [5] Above 62-63, 426-429.

though it had thus attained a conception of ownership as an absolute right, and though it gave every facility to owners out of possession to recover possession; it never departed from its original conception, that any person in de facto control is prima facie a possessor, and is, as such, entitled to all the rights of an owner, save only as against him who can show a better right. It followed, therefore, that if any person in de facto control was not to be accorded the rights of a possessor, special reasons must be produced for refusing him these rights. Roman law, on the other hand, approached the subject of ownership and possession from the opposite angle. We have seen that it regarded *dominium* and *possessio* as quite distinct conceptions. *Dominium* denoted primarily a right, and might or might not connote the fact of physical control. *Possessio* denoted primarily the fact of physical control. It had, as such, no legal consequences, and was therefore totally distinct from *dominium*.[1] But, as we have seen, it was found necessary to protect certain possessors, and so *possessio*, when thus protected, came to be a right, much more limited than, but akin to, *dominium*. But, as the result of this different conception of the relations of ownership and possession, Roman law naturally adopted the contrary point of view to that adopted by English law. It treated the cases in which possessors were protected, and not the cases in which possessors were not protected, as the exceptional cases. Thus, while in English law special reasons were needed to justify the refusal of protection to possessors, in Roman law special reasons were needed to justify the grant of such protection.

From this wide divergence in the underlying principle of the relations of ownership to possession, there have resulted many divergences in concrete legal rules. It is by looking at some of these divergences that we can see most clearly some of the important consequences of the English theory of ownership and possession. I shall consider, from this point of view, (i) the persons having de facto control to whom possession is not attributed; (ii) The consequence of attributing possession to bailees; and (iii) the acquisition of ownership by lapse of time.

(i) The persons having de facto control to whom possession is not attributed.

Though, as we have seen, English and Roman law approached this subject from opposite angles, yet both systems of law gradually worked out a detailed list of cases in which possessory remedies were not attributed to certain persons who had de facto control.

[1] Vol. ii 353; vol. iii 89-91; "Nihil commune habet proprietas cum possessione," Dig. 41.2.12.

The underlying principle from which Roman law started naturally made this list longer at Rome than it is in England. But it would, I think, be true to say that, as the underlying principles of these two legal systems were applied to the complex facts of practical life, so the consequences of both sets of principles were modified, with the result that the actual rules which resulted tended to approximate. Nor is this strange when we consider that, both the Roman prætors and jurists and the English judges, gradually built up their detailed rules under the pressure of needs and circumstances which cannot have been wholly dissimilar.

It is probable that, in the thirteenth century, the English law of possession was influenced by the Roman law both adjective and substantive.[1] We have seen that this was so in the land law. The assize of novel disseisin and the denial of possession to the termor are obvious illustrations. And, on the same principles as possession was denied to the termor, it is not improbable that possession would also have been denied to many kinds of bailees, if the influence of Roman ideas had continued.[2] But, as we have seen, the influence of these ideas did not continue.[3] On the contrary, the older traditions, which treated the bailee in possession as the owner, were too strong. Indeed these traditions were indirectly strengthened by the manner in which Bracton had identified the actio furti and the actio vi bonorum raptorum with the appeals of larceny and robbery.[4] In Roman law bailees who had no possession could bring these delictual actions, because they were purely or mainly penal. But we have seen that the appeals in English law had a strong proprietary character. They were given quite as much rei as poenæ persequendæ causa.[5] Hence the fact that bailees could bring them tended to fortify their old position as possessors; while the cessation of the influence of Roman law consolidated it. Nevertheless, in the law of chattels as in the land law, it was found necessary to deny possession to certain classes of persons who had physical control. Where the line should be drawn was perhaps at first not clear. Bracton, when discussing the right to bring the appeals, does not seem to have distinguished clearly between the servant and the bailee, perhaps because he would have denied possession to both.[6] But, as the principles of the common law became fixed, it became necessary to face this question. During the mediæval period, and in the course of the sixteenth century, the main principles were settled

[1] Vol. ii 204-205, 282; above 450.
[2] Bracton does not clearly distinguish between them, vol. iii 339-340, 363-364.
[3] Vol. ii 287. [4] Vol. iii 339-341. [5] Ibid 320.
[6] Vol. iii 363-364; cp. H.L.R. xxix 512.

both for land and chattels. In the land law possession was denied to bailiffs and others who were clearly acting for another;[1] and in the law as to chattels it was denied to servants, and to licensees, such as guests at an inn or customers in a shop.[2]

Thus the common law, like the Roman law, acquired a list of persons in physical control of property who were not possessors. But that list was, as I have said, far narrower than the Roman list, because from it were excluded the whole class of bailees. For that reason the principles underlying the English list are perhaps more intelligible. In the law as to chattels, as in the land law,[3] they would seem to depend, either upon the fact that a person is holding merely as the representative of another, or that he is given an obviously temporary control for a special purpose. But, as we shall now see, the consequence of thus allowing bailees to have possession raised some problems with which the Roman lawyers were not troubled.

(ii) The consequences of attributing possession to bailees.

When the bailor could not sue a stranger who had taken or otherwise damaged the property bailed, and when the bailee was absolutely liable to his bailor,[4] no difficulty could arise as to the competing rights of action of bailor and bailee; for their rights of action did not compete. But difficulties as to competing rights of action began when the bailor, as well as the bailee, was allowed to sue a stranger who had taken or damaged the goods.[5] Another problem arose when the bailee ceased to be absolutely liable.[6] Could a bailee who was not liable to his bailor, sue a stranger who had taken or damaged the goods and recover full damages; and, if he recovered them, was he liable to pay them over wholly or partially to his bailor?

The difficulty as to competing rights of action, was solved in one of the earliest cases in which the bailor was allowed to bring trespass against a stranger, for goods taken while in the custody of a bailee.[7] In that case, after Cavendish, C.J., had ruled that either the bailor or the bailee might bring trespass, Persay, one of the counsel, said, "Sir that is true, but he who recovers first will oust the other of his action, and that is so in many other cases, as if tenant by elegit be ousted, one or other (i.e. he or the owner) will have the assize, and if one recovers first the writ of the other is abated." This solution was accepted as good law in 1505 by

[1] Above 78-79.

[2] Vol. iii 364-365; it would seem that the same principle applies to one who holds merely as a custodian for the owner, In re Hawkins [1924] 2 Ch. 47.

[3] Above 78-79.

[4] Vol. ii 79-80; vol. iii 337-339; above 451.

[5] Vol. iii 348-349.

[6] Above 452-453.

[7] Y.B. 48 Ed. III. Mich. pl 8; vol. iii 348.

Frowicke, C.J., and by Kingsmill and Fisher, JJ.,[1] and has never been disputed.[2]

The second problem—the right of a bailee not liable to his bailor to recover full damages from a stranger—did not arise till comparatively modern times because, as we have seen, the bailee was, till 1703, generally absolutely liable to his bailor; and because, even after 1703, the bailor would, in cases where the bailee was not liable to him, generally be the person who brought the action.[3] The problem was however alluded to in 1410.[4] In that case trespass was brought by a bailee against a defendant for (amongst other things) the taking of certain beasts. The defence was that the defendant had bought the beasts from the bailor, who was the owner. In such a case Hankford, Hill, and Culpeper, JJ., agreed that the bailee could not sue by writ of trespass and recover full damages, because, under these circumstances, he was not chargeable over to the bailor;[5] but it was said by Hankford, J., that if the owner of beasts lent them for a term, and he took them before the term expired, the bailee might recover the damages which he had suffered by writ of trespass on the case.[6] That is, as between the owner and the bailee, the bailee had an interest in the property for which he was entitled to compensation.[7] This dictum does not of course bear directly on the problem which we are discussing, because, in the case before the court the defendant, being the owner, was not a mere wrongdoer. He was in effect claiming through the owner. But the reasons given for the dicta do indicate the logical result of basing the bailee's right to sue on his liability to the bailor. The

[1] Y.B. 20 Hy. VII. Mich. pl. 15—"Comme on baille biens, et estranger eux prend, si le bailor recovera damages premierement donques l'accion le bailee est determine; et si le bailee premierement recovera, donques l'accion le bailor est determine."

[2] Rolle, Ab. Trespass P. (4); Nicolls v. Bastard (1835) 2 C.M. and R. at p. 660 *per* Parke, B.; The Winkfield [1902] P. at p. 61.

[3] Above 454.

[4] Y.B. 11 Hy. IV. Mich. pl. 46 at p. 24.

[5] "Cestuy que aver le property, les vend al defendant, et cest l'effect de son justification, et cest le cause que vous ne recovera mye damage pour le value vers luy, et auxint vous n'estes my chargeable vers cesty que vous appreste les beasts, pur ceo que il meme ad vende al defendant; mes si un estranger qui n'ad rien a faire prent beasts en ma garde j'avera bref de trespass vers luy, et recovera le value des beasts, pur ceo que jeo suy charge des beasts vers cesty que moy le baile, et qui ad le property, mes icy le case est tout auter, *quod Hill and Culpeper concesserunt*," ibid.

[6] "Je voille bien que en ascun case home avera general bref de trespass, coment que les beasts sont a auter. mes si jeo allowe certeins beasts a vous tanque a certain temps, si jeo preigne les beasts deins le terme, vous n'averez my briefe de trespass come de vous beasts propres, car donques vous duisses recoverer damages vers moy pur le very value des beasts, et ceo n'est mye reason, mes vous averez briefe de trespass sur le case pur le perd del maynurance d'eux, et pur le compester," ibid.

[7] This principle was recognized in Brierly v. Kendall (1852) 17 Q.B. 937, where it was said *arguendo*, at p. 942, that there appeared to be no case precisely in point; and in Belsize Motor Supply Co. v. Cox [1914] 1 K.B. 244; and it applies also to an assignee of the interest of a pledgee, Whiteley v. Hilt [1918] 2 K.B. 808.

logical result is to give him no right of action at all if he is not liable over, and has suffered no damage; and if he has suffered any damage, to allow him a right of action to recover, not the value of the property, but only the actual pecuniary loss which he has sustained. Thus both bailor and bailee could in such a case bring separate actions to recover their respective damages. This solution was substantially that adopted in 1892 in the case of *Claridge v. South Staffordshire Tramway Co.*,[1] and it is not in itself unreasonable. But we have seen that that case was rightly overruled by *the Winkfield*,[2] on the ground that a bailee's right of action against a wrongdoer rests, not upon his liability over, but upon his possession. A bailee can therefore recover full damages against a wrongdoer, whether he is liable over or not. But this at once raises the question, Who is entitled to the damages so recovered? The answer is that as the damages represent the property bailed, bailor and bailee are entitled in the ratio of their respective interests. "As the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it."[3] The fact that the bailee was not liable to the bailor for the destruction or injury to the chattel bailed does not affect his liability to return the damages which now represent it. That is not a liability in tort, but a liability on the contract of bailment. It would follow that in a case like that of *the Winkfield*, where the Crown was in effect the bailee, a petition of right would lie for the repayment by the Crown of the damages recovered by it.[4]

(iii) The acquisition of ownership by lapse of time.

We have seen that one of the results of the common law theory of ownership and possession is that the common law knows no system of *usucapio*, by which possession becomes ownership after the lapse of a certain time.[5] Since possession confers all the powers of ownership as against all the world except as against the person with a better right, all the law need do, when it wishes to establish the title of the possessor, is to prevent the owner from asserting that better right. Hence, in the case of chattels, as in the case of land, the law provides no system of positive prescription, but only a system of limitation of actions. Under James I.'s statute[6] the rights of action of the true owner

[1] [1892] 1 Q.B. 422; "If both the bailee and the bailor have suffered damages by the wrongful act of a third party; I think that each may bring a separate action for the loss sustained by himself," *per* Hawkins, J., ibid at p. 424.

[2] [1902] P. 42; above 454. [3] The Winkfield [1902] P. at p. 60.

[4] It would in effect be a case where "the lands or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money," *per* Cockburn, C.J., Feather v. The Queen (1865) 6 B. and S. at p. 294.

[5] Vol. iii 94. [6] 21 James I. c. 16; vol. iv 533.

are barred in six years. The period allowed in the case of land was and is different from the period allowed in the case of chattels;[1] but, until the Act of 1833,[2] the principle was the same; for it was only the right of action of the true owner which was barred. As we have seen, the Act of 1833 went further. It not only barred the true owner's right of action but also extinguished his title.[3] Since no such Act has been passed in relation to chattels, it follows that the lapse of the period fixed does not bar the true owner's title, but only his right of action.

From this it follows that, if A converts B's property and remains in possession for six years, and, after that period has elapsed, B gets back into possession, A could not succeed in an action of conversion against him.[4] This was the law as to land, and, it would seem, is still the law as to chattels.[5] Further, it would seem that if A converts B's property and remains in possession for six years, and then the property gets into the hands of C, B could sue C for conversion at any time within six years from the act of conversion committed by C.[6] This would seem to be the logical result of the provisions of the statute of limitation; and effect was given to it in 1891 by the case of *Miller v. Dell*.[7] Whether these results are convenient, or indeed consonant to the principles on which the statute of limitation rests, is another question. There is, it would seem, a good deal to be said for extending to chattels the policy of not only barring the true owner's right of action, but also extinguishing his title.[8]

We must now examine some of the differences between the principles governing the ownership and possession of chattels and of land which have arisen, not from express statutory enactments, but from historical differences in the manner in which these principles have been evolved.

[1] Vol. iv 484-485; above 51-52.

[2] 3, 4 William IV. c. 27.

[3] Above 80.

[4] This was decided in the case of land under the older Acts, Burrough v. Reade (1807) 8 East 353; above 51 n. 7.

[5] "The property in chattels . . . is not changed by the statute of limitations though more than six years may elapse, and if the rightful owner recovers these, the other man cannot maintain an action against him in respect of them," *per* Lord Esher, M.R., Miller v. Dell [1891] 1 Q.B. at p. 471.

[6] Miller v. Dell [1891] 1 Q.B. 468. The time runs from the act of conversion, i.e. from the taking by C, if that amounted to conversion, or from the demand by the plaintiff and refusal by the defendant, if the taking by the defendant did not amount to a conversion, Granger v. George (1826) 5 B. and C. 149; Spackman v. Foster (1883) 11 Q.B.D. 99.

[7] [1891] 1 Q.B. 468.

[8] I agree with Salmond, Torts (3rd ed.) 331, that it is desirable that the original wrongdoer's rights acquired under the statute "should be assignable and transmissible"; but I cannot agree with him that this is the law; nor can I agree with him, ibid 332, that, if my view of the law be accepted, chattels could be recovered from an agent or servant of the wrongdoer, as, while under the control of such agent or servant, they are still in the wrongdoer's possession, above 424.

(3) *The differences between the principles governing the ownership and possession of chattels and the principles applicable to land.*

We have seen that in this, as in the mediæval period, the broad principles of the law as to ownership and possession of chattels have followed a course of development essentially the same as the course of development of these same principles in relation to land;[1] and we have seen that some of the legal consequences which flowed from them are also analogous.[2] But, as in the Middle Ages,[3] there are differences both in the principles themselves and in their consequences, which are due partly to the influence which the real actions have exercised over the development of the land law, and partly to the physical differences between land and chattels. These two causes have given rise to two outstanding differences. Firstly, there is a difference arising from the fact that, in the case of land, the nature of the remedies provided has emphasized the proprietary aspect of the protection of possession; while, in the case of chattels, the nature of the remedies provided has emphasized its delictual aspect. Secondly, the indestructible character of land, which helped to give rise to the doctrine of estates, together with the wide powers of alienation which, owing to the operation of the statutes of Uses and Wills, landowners acquired during this period, made possible the creation of many kinds of legal interests in land, which were not possible in the case of chattels. Let us consider briefly the effect of these two differences upon the development of the law.

(i) We have seen that the reasons why the law protects possession are many and various. In fact, they fall into two main groups, which we can label proprietary and delictual. Possession is protected for proprietary reasons, both because possession gives a right as against those who have no better right, and because it enures for the benefit of the owner who is in possession. It is protected for delictual reasons, because, otherwise persons who thought they had a right, and even those who knew they had none, might be tempted to commit such offences as assaults and forcible entries.[4] We have seen that in the Middle Ages the seisin of land was protected for all these reasons —the assize of novel disseisin, when it first made its appearance, had a strong delictual flavour.[5] But, in the case of land, the real actions which protected seisin developed their proprietary side almost exclusively. So much did the delictual aspect of the protection of possession drop out of sight that it was necessary, in Richard II.'s reign, to legislate specially against forcible entries.[6]

[1] Above 80-81. [2] Above 455, 456, 458. [3] Vol. iii 351-352.
[4] Ibid 95. [5] Ibid 8. [6] Ibid 27.

In the case of chattels, on the other hand, the delictual aspect of the protection of possession was almost exclusively developed. It is true that the older personal actions—debt and detinue—were largely proprietary; but they had both a delictual and a contractual aspect.[1] They were essentially personal actions; and so the defendant could never be compelled to make specific restitution, if he was willing to pay the value of the chattel.[2] Moreover, the delictual character of the actions which protected the possession, and the right to the possession of chattels, was much emphasized when the older personal actions were largely superseded by trespass and its offshoots. We have seen that trespass was, at the outset, a semi-criminal remedy for many forms of wrongdoing, whether connected with a violation of possession or not;[3] that all the offshoots of trespass long retained a delictual character;[4] and that most of them retained it to the end.[5]

From this broad difference between the manner in which the law as to the possession of land and chattels has been developed, several consequences have ensued.

Firstly, while the law as to the possession of land falls, and has always fallen, under the rubric "real property," the law as to the possession of chattels was developed in and through the law of crime and tort. Hence it is, as we have seen,[6] in the law of crime and tort that we must look for the origin and development of its principles.

Secondly, for this reason, the judges have, in the case of chattels, always emphasized the delictual aspect of the protection of possession. It was natural that this idea should be recognized by Bracton, for it was prominent in the Roman authorities with which he was conversant;[7] and the delictual form of the actions by which possession was protected fostered it. Thus, as Mr. Bordwell has pointed out,[8] Brian, C.J., and other judges of the

[1] Vol. ii 366-368; vol. iii 325-327, 337, 348-349, 420; above 437-440; cp. P. and M. ii 178 citing Y.B. 20-21 Ed. I. (R.S.) 121.

[2] Vol. iii 322.

[3] Vol. ii 364-365; vol. iii 317-318, 370-371.

[4] Ibid 451, 581; above 440.

[5] Above 441-442.

[6] Above 447, 465.

[7] Bordwell, Property in Chattels, H.L.R. xxix 510-512, and the passages from Bracton there cited; Bracton (f. 103 b), though he allowed the appeal of larceny or actio furti to the owner only, allowed the appeal of robbery or actio vi bonorum raptorum to the owner or the possessor; this Mr. Bordwell thinks is due to the fact that robbery, being essentially a wrong to the person of the possessor, this appeal could be brought by him, ibid 748-749; but I doubt whether so much stress can be laid on this passage, see vol. iii 339 n. 8; for the delictual aspect of the assize of Novel Disseisin when it first made its appearance see vol. iii 8. In this connection it should be noted that, in so far as the possession of land was protected by the writ of trespass, the delictual aspect of the protection of possession is prominent. Pollock and Wright, Possession 123 n. 1; Y.B. 42 Ed. III. Hil. pl. 7 p. 2; 2 Rolle's Ab. 569 *Trespass* P. 4.

[8] H.L.R. xxix 384.

fifteenth century, were probably influenced by this idea when they ruled that, though the owner could bring trespass against the man who had taken his property from him, he could not bring it against a person to whom the taker had given it, or against a person who had taken it from the first taker.[1] And the idea has been very permanent. When, in 1844, in the case of *Rogers v. Spence*,[2] Lord Denman, C.J., uttered his classical dictum to the effect that the protection of the possession of land and chattels, given by the actions of trespass quare clausum fregit and trespass to goods, was in substance "an extension of that protection which the law throws round the person," he was merely putting explicitly what had been implicit in the judgments and dicta of his predecessors from the earliest days of the common law.[3] His dictum has been made famous by writers upon general jurisprudence, mainly because it coincides with the theory which Savigny put forward as the reason for the protection of possession in Roman law.[4] No doubt this was one of the most important reasons for the protection of possession in Roman law; and, as we have seen, it was present to the mind of Bracton. But, for all that, Savigny's theory is an inadequate generalization; for, as Maitland has shown, there are many other reasons for the protection of possession in English law; and, as we have seen, those reasons were equally operative in Roman law.[5] Roman law, like English law, was built up gradually; and now one reason, and now another, determined the origin and developments of its rules. But, unfortunately for the interpretation of its texts, they have fallen into the hands of German legal philosophers, who have constructed from them logical theories, which never wholly fit the actual rules,[6] because those rules were, like the rules of English law, made to fit the illogical facts of life.[7]

[1] Y.B. 21 Ed. IV. Hil. pl. 6. [2] 13 M. and W. at p. 581.

[3] "It was the idea of property 'as an extension of that protection which the law throws around the person' that was uppermost in the minds of Brian, C.J., and those other judges of the time of Henry VII., just as it was three centuries and more later to Lord Denman," H.L.R. xxix 384.

[4] E.g. Holland, Jurisprudence (5th ed.) 178. [5] Vol. iii 95 and n. 5.

[6] A good illustration is to be found in the theories put forth by Savigny and Ihering respectively to explain the difference between mere detention and interdict possession; neither theory is satisfactory, for, as Holland says, Jurisprudence (5th ed.) 169, "just as Savigny was obliged to allow a fictitious derivative possession in the case of the pledge holder and others who on principle would not be possessors, so does Ihering pray in aid a variety of special rules of law to explain the denial to borrowers, lessees, and the like, of the possessory remedies to which in accordance with this theory they are *prima facie* entitled."

[7] It seems to me that the Roman lawyers required a detention corpore et animo, i.e. physical control and a knowledge of and an intention to maintain such control (Dig. 41.2 1.2; 41.2.41; 41.2.3. 3); and in addition a causa, i.e. a sufficient reason in law for the protection of such detention; when these requisites were present there was a possession protected by the interdicts—"genera possessionum tot sunt quot et causæ adquirendi ejus quod nostrum non sit, velut pro emptore, pro donato, pro

Thirdly, owing to the fact that the seisin of land was protected by real actions in which the land itself could be recovered, the ownership of land was a better realized conception than the ownership of chattels. Hence we get the paradox that the law recognizes no absolute ownership in land, but only at most an estate in fee simple held of the crown, and yet the dispossessed owner could get specific restitution; and that it does recognize an absolute ownership in chattels, and yet the dispossessed owner had at common law no remedy by which he could get such restitution. This is a paradox when stated in terms of modern law. But it is no paradox to the legal historian; for it is simply the logical outcome of the historical development of these branches of the law. We have seen that, by the end of the thirteenth century, the obligations involved in tenure put no substantial restrictions upon the absolute ownership of the tenant in fee simple;[1] while the development, under the influence of the real actions, of the powers and rights of a person so seised, gave him far fuller and more varied powers of disposition than were possessed by the owner of chattels.[2] The development of the powers and rights of the owner of chattels through personal actions of a delictual type, left his powers of disposition comparatively meagre. It is true that he had a testamentary power which was denied to the owner of an estate in fee simple;[3] but, as we shall now see, he never got the power to create those varied estates which, in the Middle Ages, and to a still greater degree during this period, were possessed by the landowner.

(ii) We have seen that in the Middle Ages many various interests might be coexisting in the same piece of land. Owing to the operation of the doctrines of tenure there might, for instance, be a tenant in fee simple holding of the crown; there might be a copyhold tenant holding of such tenant in fee simple; and, if the custom of the manor allowed, there might be a tenant for years holding of the copyhold tenant. Then, too, such tenant in fee simple might have conveyed part of his land to another for life or in tail, leaving a reversion in himself, or he might have limited remainders over to others; and still further powers of creating complicated settlements of the legal estate in land were given by the statutes of Uses and Wills. All these legal interests,

legato, pro dote, pro herede, pro noxæ dedito, pro suo," Dig. 41.2.3.21; thus any kind of possession could be protected which it was considered expedient to protect—the presence or absence of the causa gave or withheld the status of possession from any given case of detention corpore et animo, just as its presence or absence gave or withheld from any given pact the status of a contractual obligatio; thus the Romans worked out a flexible theory, which enabled them to mould their law on the basis of expediency rather than of logic.

[1] Vol. iii 45-46, 73. [2] Below 469-470. [3] Vol. iii 75-76.

which might be thus existing simultaneously in a given piece of land, were protected by appropriate remedies. As we have seen, it was the nature and the variety of these remedies which, in the Middle Ages, gave to all these simultaneous estates in the land that reality, and that capacity for simultaneous coexistence, which is the distinguishing characteristic of the English doctrine of estates.[1] The estate, whether in possession or not, was regarded, not as a mere chose in action, but as a very real thing; and this conception tended to increase the owner's power of disposition; for, though not entitled to the possession or seisin, he could be regarded as the owner of an actually existing interest, which was merely deferred in point of time.

Compared with these large powers of disposition which were open to the landowner, the powers of the owner of chattels were very meagre. As Maitland has said,[2] "the compatibility of divers seisins permits the rapid development of a land law which will give both to letter and hirer, feoffor and feoffee, rights of a very real and intense kind in the land, each protected by its own appropriate action, at a time when the backward and meagre law of personal property can hardly sanction two rights in one thing, and will not be dissatisfied with itself if it achieves the punishment of thieves and the restitution of stolen goods to those from whose seisin they have been taken." Compared with the land law, the common law rules as to chattels personal have continued to the end to be "backward and meagre." This is due to three causes. Firstly, many chattels personal have always been, if not of an actually consumable, at least of a perishable nature, so that their owners have had no pressing need for large powers of disposition enabling them to create and settle future interests in them.[3] Secondly, when, with advancing civilization, the needs of the owners of property for larger powers of disposition might have been expected to lead to an expansion of common law rules, these owners found that they could satisfy their needs far more easily by employing the machinery of the use or trust. Uses of chattels did not fall within the statute of Uses; and therefore the development of the law as to the creation of future interests in chattels personal was the work, not of the common law, but of equity.[4] Thirdly, the common law was concerned mainly with dispositions of chattels personal inter vivos: most questions of testamentary disposition were regulated by the ecclesiastical courts. But, in the Middle Ages, when chattels personal were generally of a perishable nature, it was generally by will that owners attempted to create future interests in these chattels. Such settlements do

[1] Vol. ii 350-352.
[2] P. and M. ii 181.
[3] Vol. iv 421; cp. Bl. Comm. ii 398.
[4] Vol. iv 476.

not seem to have been attempted inter vivos, with the result that there was no pressing demand for the expansion of common law remedies to deal with such cases; and therefore no expansion of the common rules on this topic took place.

This last reason for the backwardness and meagreness of the law as to chattels personal was, as we have seen,[1] a main reason for the difference between the extent of the powers of a dispossessed owner of chattels to deal with them by will, and the extent of his powers to deal with them inter vivos. As we shall now see, it has produced a similar difference in the common law rules as to his powers to create future interests in his chattels. We must therefore consider his legal powers of disposition under these two heads.[2]

(*a*) *Dispositions inter vivos.*—An owner could bail his property to another, or he could, it would seem, grant it to another on condition;[3] but in both these cases he alone could sue by action of detinue, or take advantage of such a condition.[4] If, by a single conveyance, chattels were given to A for life or a term of years, and then to B, B had no legal remedy by which he could obtain the chattels on the termination of A's interest.[5] If the action of account had been developed it might conceivably have furnished such a remedy. As we have seen,[6] it covered "all sorts of cases where money had been paid on condition or to be dealt with in some way prescribed by the person paying it." But it was never extended beyond the case of money; its application came to be limited to very few accountants; its machinery was too cumbersome to be effective; and so, as we shall see, it was superseded, partly by the growth of assumpsit to cover all and more than all the field which it occupied,[7] and partly by the superior remedies given by the court of Chancery.[8] Therefore we meet in the books no cases of grants inter vivos of successive interests in chattels personal; and Brooke, in his Abridgement, states categorically that such a gift is void, "for the gift of a chattel for an hour is a gift of it for ever."[9] This view of the law has never been disputed in the case of chattels quae usu consumuntur; and, in the

[1] Above 456-458.

[2] On this subject see Gray, Perpetuities (2nd ed.) 62-68, 575-583; D. T. Oliver, Interests for life and quasi-remainders in chattels personal, L.Q.R. xxiv 431.

[3] Gray, Perpetuities 62.

[4] Vol. ii 594 n. 5; vol. iv 116, 419.

[5] Nor could the owner of chattels bailed for a term convey the chattels so bailed to a third person; as we have seen, above 455-456, if a person bailed his chattels for a term, he could not, while thus out of possession, convey his right to the reversion, because it was a chose in action.

[6] Vol. iii 426-428.

[7] Vol. viii 88-92.

[8] Vol. v 288, 315; vol. vi 650-652.

[9] Brooke, Ab. *Done et Remainder* pl. 57; the case abridged is Y.B. 37 Hy. VI. Trin. pl. 11, which concerned a testamentary disposition, below 472; the sentence cited in the text does not appear in the printed Y.B.

case of these chattels, the same rule applies both to dispositions inter vivos and to testamentary dispositions.[1]

The only authority for the contrary proposition in the case of non-consumable chattels, is Blackstone's statement that "if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good."[2] This passage, it has been pointed out, "is an almost verbatim transcript of a passage in a manuscript treatise of Lord Chief Baron Gilbert, unpublished at the time Blackstone wrote, but afterwards embodied in the article on 'Remainder and Reversion' in Gwillim's edition of Bacon's Abridgement."[3] It would seem from this passage that both Gilbert and Blackstone confused the two very different questions of the creation of such interests inter vivos and their creation by will; and, if that is so, it is clear that their statements of the law cannot prevail against Brooke's specific statement to the contrary, and the total absence of any case in which such a limitation has been upheld.[4] As we shall now see, the history of the owner's testamentary powers of disposition over his chattels (other than consumable chattels) has been very different.

(*b*) *Dispositions by will.*—The essence of the mediæval will was the appointment of an executor; and the executor was a person who took the property on trust for, or to the use of, the beneficiaries or other persons interested under the will.[5] Hence, just as many things which were impossible at common law could be done through the medium of a feoffee to uses,[6] so many things otherwise impossible could be done through the medium of an executor. The common law judges were perfectly well aware of this fact; and therefore they did not hesitate to allow testators to do by will what they refused to allow them to do by an act inter vivos.

We have seen that by a will a person could bequeath choses in action.[7] There would seem, therefore, to be no difficulty in allowing a testator to direct that his executors should allow A to have his chattels for a term, and that, on the expiration of the term, they should belong to B. There is very little authority on this point; but I think that what authority there is favours the view that such a bequest is valid; and that the first taker gets the possession of the chattels, and the ultimate taker the ownership, so that the first taker is in the position of a bailee. This

[1] Randall v. Russell (1817) 3 Mer. at pp. 194-195 *per* Sir W. Grant, M.R.; Gray, Perpetuities 576; cp. Williams, Executors (9th ed.) ii 1253.
[2] Comm. ii 398. [3] L.Q.R. xxiv 431 seqq.
[4] Gray, Perpetuities 578; but in America, except in North Carolina, Blackstone's statement of the law has been followed, ibid 583-584.
[5] Vol. iii 537, 547-548. [6] Vol. iv 436-437. [7] Above 457.

solution is favoured by Gray,[1] and seems to be in accordance with principle, and with what little authority there is.[2] But it may possibly be held that he holds the same position as a person to whom a life interest has been given.

There is a good deal more authority on the effect of a limitation by a testator to A for life and then over. This question came before the courts in 1459;[3] and the treatment of the question in this case has formed the starting point for the discussion of this question in all the later cases on this topic. The facts of that case were as follows:—A testator appointed A and B his executors, and bequeathed a mass book to B for life, and after his death to A for life, and after his death to the parishioners of a certain parish. After the testator's death B kept the book, and bailed it to the churchwardens of the parish, on the terms that they should rebail it to him at his request. B then died, and A took the book. Thereupon the churchwardens sued him for trespass; and, according to Plowden,[4] they succeeded. The result of the action does not appear from the printed Year Book; but it would appear from the reasoning of Prisot, C.J., that Plowden was probably right in his view of the result of the action. Prisot, C.J., said,[5] "In this case the will was that B should have it for the term of his life, and then the defendant, and then the parish; and so the devise proves in itself that the property in the book was always in the executors to the uses declared by the testator, and not in the devisees; for they shall have but the occupation and 'manurance' for the term of their two lives, and so there is no property in them. . . . And so the intent of the deceased was that it should remain to the said B for the term of his life, and then to the defendant as aforesaid, and that by the view and disposition of the executors; and that then at the last the executors should hand it over to the parishioners; and that proves that the property remains entirely in the

[1] Perpetuities 581.

[2] Anon. (1641) March 106, cited below 474; this case, it will be seen, favours the idea that the first taker, whether for years or for life, has the possession, for his position is compared to that of a pawnee; we shall see that this is not the position of the first taker to whom a life interest has been given, below 473-474; but it may possibly be held to be the position of the first taker to whom an interest has been given for a term.

[3] Y.B. 37 Hy. VI. Trin. pl. 11.

[4] Paramour v. Yardley (1579) Plowden at p. 542.

[5] "En ceo cas le volonte fuit que B. avera pur temps de sa vie, et puis le defendant, et puis le paroisse; et issint le devise prove en luy meme que le property del dit book fuit touts dits en l'executors al oeps le testator, et nemy en les devisees; car ils n'auront que l'occupation et manurance pur temps de lour deux vies, et issint nul property a eux . . .; et issint l'entente del mort fuit que il demeure al dit B pur temps de sa vie, et que puis al defendant, ut supra, et ce per view et disposition l'executors, et adonques al dernier que les executors ce liverent a les paroissiens, et issint prove que le property demeurt touts dits en les executors al oeps le testator; et issint le disposition append, et le livre a ses executors, et per consequens le seisin sans eux torcionious," Y.B. 37 Hy. VI. Trin. pl. 11 p. 30.

executors to the uses declared by the testator; and thus the disposition takes its course, and the book goes to his executors, and consequently any possession of it without their consent is tortious." It followed, therefore, that all that A and B were entitled to was the "occupation" of the book. The property was in the parish by reason of the consent of the executors; and A having only the "occupation," had not the right to take it from the churchwardens, who were the owners.

It would thus seem that the court held that the property was, at the death of the testator, vested in the executors to the uses declared by him; that the transfer of the book by one of the executors to the churchwardens vested in them the property in the book; and that the two executors were only given in succession a right to use, and not a right of property. In other words, after the assent by the executors or one of them to the bequest of the book, or its transfer by both or one of them to the ultimate beneficiary, i.e. the churchwardens, the property was in the churchwardens, subject to the right of the executors to use it successively during their lives. The rule that there could be no remainder in a chattel—the rule that "the gift of a chattel for an hour is a gift for ever"[1]—was not infringed; for the property was always in the parish, subject to the use and occupation of the executors for their lives. This view as to the effect of such a gift seems also to have been taken by Dyer, C.J., in 1565, and to have been considered by him to be applicable to bequests both of chattels real and chattels personal.[2] But we have seen that, in the case of chattels real, the common law courts, at the beginning of the seventeenth century, refused to allow a distinction between the bequest of the use of a term and a bequest of the term itself; and that, confronted by the technical difficulty of allowing a life interest in a term, and fearing the competition of the court of Chancery and the ecclesiastical courts if they refused to admit the validity of such a gift, they changed their opinions as to its effect. We have seen that they adopted the view that such a gift of chattels real gave the first taker a vested legal interest in possession in the whole term, and the second taker a legal interest by way of executory devise only, which did not become a vested interest till

[1] Above 470.

[2] "Note by Dyer, that the Lord FitzJames, late Chief Justice of England, did devise his land to Nicholas FitzJames in taile with divers remainders over, and in the same devise he devised divers jewels and pieces of plate, viz. the use of them to the said Nicholas FitzJames, and the heirs male of his body. In this case it was the opinion of the Court, that the said Nicholas had no property in the said plate, but only the use and occupation. And the same law when the devise was that his wife should inhabit in one of his houses which he had for term of years, during her life, because the wife takes no interest in the term, but only an occupation and usage . . . but Walsh held the contrary," Owen 33.

after the determination of the first taker's interest[1] No such change of opinion took place in the construction of gifts of chattels personal; and the fact that the courts still construed them in the same way was pointed out by the court of Common Pleas in 1641.[2]

In that case a testator devised his chattels to his wife for life, and after her death to J.S. J.S., in the lifetime of the wife, brought a suit in equity in the Council of the Marches of Wales to secure his interest. Thereupon application was made for a writ of prohibition on the ground that "the devise in the remainder of goods was void, and therefore no remedy in equity, for *aequitas sequitur legem.*"[3] The prohibition was awarded, thus showing that Brooke's dictum,[4] and the case cited by Rolle,[5] were still regarded as good law. But Banks, C.J., "took the difference betwixt the devise of the use and occupation of goods, and the devise of goods themselves. For, when the goods themselves are devised, there can be no remainder over; otherwise when the use and occupation only is devised. . . . It is true that the devise of use and occupation of land is a devise of the land itself, but not so in the case of goods, for one may have the occupation of goods, and another the interest, and so it is when a man pawns goods and and the like."[6] This was an able summary of the common law on this topic as it had been developed and settled up to this date. Moreover, it is clear from books of precedents in conveyancing[7] that their writers or compilers took this view of the law; and it is clear from Godolphin that it was acquiesced in by the ecclesiastical lawyers.[8] Indeed, it is probable that they would acquiesce in it; for they were familiar with the rule that a testator could create a usufruct by a legacy, and give the dominium, subject to the usufruct, to another. The common law rule, it is obvious, could be exactly translated into these terms.

During the latter part of the seventeenth century these common law principles began to be modified by the decisions of the court of Chancery. The effect upon these bequests of these decisions, and the deductions drawn from them, have given rise to very considerable diversity of opinion as to the exact manner in which, and

[1] Above 129, 130-132.

[2] Anon. March. 106; and see Eq. Cas. Ab. i 360-361.

[3] Thus Rolle, Ab. *Devise* K. 4, citing a decision of 1608, says "Si home devise un chattel personal al un pur vie, le remainder al auter, ceo est un voyd remainder."

[4] Above 470. [5] Note 3.

[6] As to this comparison with the interest of the pawnee see above 472 n. 2; the same view seems to have been taken by Richardson, C.J., and Croke, J., in Hastings v. Archibald (1633) Cro. Car. at pp. 346-347.

[7] West, Symboleography (ed. 1615) § 425—a gift of goods in which the use is reserved; Modern Conveyancer (3rd ed. 1706) 138-140—a precedent in which a vendor of goods reserves the use, covenanting to do necessary repairs.

[8] Orphan's Legacy Pt. 3 chap. viii. § 5; chap. xiii. § 51.

the conditions under which, these bequests operate at the present day. We must consider, in the first place, the three theories which have emerged on this matter, and the practical results of adopting one or other of them; and, in the second place, the question which of these three theories should be preferred.

The three theories and their consequences.[1]—(i) If chattels are devised to A for life and then to B, A has the whole legal interest on trust for himself for life, and then in trust for B. (ii) A is the legal owner of the property, and B has an executory interest during A's life. (iii) A has simply the use of the chattels, and B has from the outset the property.

If the first theory be adopted, a purchaser for value from A without notice of B's interest, would get a good title; but if either of the other two theories are adopted he would not. As between the second and the third theory, the practical consequences of adopting one or other would seem to be three in number. Firstly, if the second theory is adopted B's interest does not vest till A's death, while if the third theory be adopted, it vests at the death of the testator. If a testator has created several limited interests before the ultimate bequest to B, the working of the rule against perpetuities may cause the bequest to B to be valid or not, according as one or other theory is adopted. That rule cannot apply if the third theory is adopted and B's interest is regarded as vested;[2] it may well apply if the second theory is adopted, and B's interest is regarded as executory. Secondly, it is probable that, if a testator bequeaths chattels to A for life, and makes no further bequest, the bequest will, if the second theory be adopted, be construed as a gift to A for ever.[3] On the other hand, if the third theory be adopted, A will only have the use, so that on his death, the chattels will go to the testator's next of kin or residuary legatee. Thirdly, questions have arisen under the Bills of Sale Acts out of attempted alienations by B, the ultimate legatee. If the second theory be adopted B's interest is merely a chose in action, and does not require registration under the Bills of Sale Acts;[4] but if the third theory be adopted it is a vested interest which requires registration.

Which of these three theories should be preferred?—The first theory, which makes the first taker trustee for the ultimate taker, was perhaps favoured by one or two seventeenth century cases;[5] and it found favour with Fearne.[6] But, as Gray has pointed out,[7]

[1] Gray, Perpetuities 65-68, 578-583; L.Q.R. xxiv 433.
[2] Above 222-223. [3] Above 473-474; Re Percy (1883) 24 C.D. 616.
[4] Re Tritton (1889) 6 Morell 250, 61 L.T. 301; Re Thynne [1911] 1 Ch. 282.
[5] Catchmay v. Nicholas (1673) Cases Temp. Finch 116; Shirley v. Ferrers (1690) 1 P. Wms. 6 note; but in the latter case the trust theory does not so clearly appear as in the former; this theory comes out clearly in Anon. 2 Freeman 137.
[6] Contingent Remainders 414, cited L.Q.R. xxiv 437. [7] Perpetuities 66-67.

it is irreconcilable with the case of *Hoare v. Parker*,[1] in which the ultimate taker was apparently allowed, after the death of the life tenant, to bring trover for the goods bequeathed against the person to whom the life tenant had pawned them. There is, in fact, little or no real authority in favour of this theory.

The second theory, which gives the whole interest to the first taker and an executory interest only to the ultimate taker, is favoured by a large number of distinguished authors—Preston, Butler, Jarman, Lewis,[2] and Marsden;[3] and it was perhaps the view taken by Lord Thurlow.[4] But, till quite modern times, it would have been difficult to cite any specific decisions in support of it. However, the two cases of *Re Tritton*[5] in 1889, and *Re Thynne*[6] in 1910, favour this view, as, in both these cases, it was held that the ultimate taker's interest was a chose in action, and, as such did not require registration under the Bills of Sale Acts; and it is still more decisively favoured by the case of *Re Backhouse* in 1921, in which it was held that the rule against perpetuities applies to the gift over.[7]

The third theory, which gives the use only to the first taker, and vests the property immediately in the ultimate taker, seems to be the best supported by history; and it has some support from modern cases. We have seen that it was the rule of the common law down to the middle of the seventeenth century; and that it was the rule approved by the ecclesiastical lawyers.[8] In 1669, in the case of *Vachel v. Vachel*,[9] it was accepted by the court of Chancery. It is true, as we have seen, that other views were suggested in later seventeenth-century cases;[10] but this view was, after consideration, adhered to by Lord Keeper Somers in the case of *Hyde v. Parratt* in 1695;[11] and his decision was followed in the eighteenth century.[12] In the nineteenth century it was followed by Sir W. Grant in 1817 in the case of *Randall v. Russell*,[13] and by Malins, V.C., in *Evans v. Walker*[14] in 1876;

[1] (1788) 2 T.R. 376.

[2] Preston, Abstracts of Title ii 144; Butler note on p. 401 of Fearne, Contingent Remainders; Jarman, Wills (5th ed.) i 838; Lewis, Law of Perpetuity 95-96—all cited L.Q.R. xxiv 431.

[3] Perpetuities 43-44, cited Gray, Perpetuities 582.

[4] Foley v. Burnell (1755) 1 Bro. C.C. at p. 278.

[5] 6 Morell 250, 61 L.T. 301.

[6] [1911] 1 Ch. 282.

[7] [1921] 2 Ch. 51.

[8] Above 474.

[9] 1 Chancery Cases 129.

[10] Above 474 nn. 3 and 6.

[11] 1 P. Wms. 1; at p. 6 it is said, "the *Lord Keeper* took time to consider of it, and afterwards on the strength and authority of the late precedents, which had followed the civil and canon laws, in construing the *use* of the thing, and not the thing itself to pass when the first devise is for a limited time . . . allowed the devise over to be good."

[12] Tissen v. Tissen (1718) 1 P. Wms. 500, 502-503; Upwell v. Halsey (1720) ibid 651.

[13] 3 Mer. at p. 195.

[14] 3 C.D. 211. It is pointed out in L.Q.R. xxiv 436 that this view is also taken by the author of the 5th ed. of Comyns's Digest, *Estates by Devise*.

and it is the theory supported by Gray[1] and Williams.[2] According to this view, a remainder in chattels personal is still, strictly speaking, impossible. Brooke's and Rolle's statements that "the gift of a chattel for an hour is the gift of it for ever" are still law;[3] but, if possible, the court will uphold the testator's intention by giving the property to the ultimate taker, subject to the gift of the use of it to the donee for life. If this is the correct view, equity has followed both the common law and the ecclesiastical law. The only addition to the law which it has made is the rule that it will, in the interest of the ultimate taker, compel the donee for life to take an inventory of the chattels bequeathed.[4]

Probably Gray is right in thinking that the analogy to the undoubted rule applicable to chattels real, is responsible for the currency of the second—the executory interest theory.[5] But, as he points out, the main reason for laying down that rule in the case of chattels real was the fact that an estate for life could not, for technical reasons, be created in a term.[6] This reason did not apply to chattels personal, so that there was no reason to change the rule laid down in the Year Books. No doubt the executory interest theory is supported by the three recent cases of *Re Tritton*,[7] *Re Thynne*,[8] and *Re Backhouse*;[9] but it is clear from the reports of the first two of these cases that the root principles upon which the decision should have rested were never alluded to either by counsel or the court; and that, though these principles were brought to the notice of the court in the third case, they were not fully considered by it. It is open to the court of Appeal to give effect to the far stronger chain of ancient and modern authorities, which support the view that, in the case of a bequest of a chattel personal to A for life, and then over to B, B takes an immediate vested interest in the chattel, subject to A's right of user.

The paucity of authority, and the obscurity of the rules, upon this question of the creation of successive interests in chattels personal, show that the whole topic is and long has been a little explored backwater of the law. This is due to the fact that all these legal rules were superseded by the growth and development of equitable trusts of chattels personal, which, as we have seen,[10] expanded with the growth of stocks and shares and other similar

[1] Perpetuities 67.
[2] Personal Property (16th ed.) 358, cited L.Q.R. xxiv 432.
[3] Above 470, 474; Re Percy (1883) 24 C.D. 616.
[4] Williams, Executors (9th ed.) ii 1252-1253; the older practice was to compel the first taker to give security, but this is now not required, ibid.
[5] Perpetuities 579-580. [6] Ibid; above 129, 131. [7] 6 Morell 250.
[8] [1911] 1 Ch. 282. [9] [1921] 2 Ch. 51.
[10] Vol. iv 476; vol. v 304-307; vol. vi 642-644.

species of indestructible chattels. In the case of land, the growth of the equitable trust simply added one more species to the many different legal varieties of future estate, which were possible at common law or under the statutes of Uses and Wills. In the case of chattels personal the growth of these future interests is almost wholly bound up with the equitable trust, the detailed history of which I shall hope to relate in a subsequent Book of this History.

We can thus see that, though the fundamental principles of the law of ownership and possession are the same for chattels as for land, though many of the consequences of these principles are also the same, yet there are great and striking differences. Consequently in our modern law, as in the mediæval law,[1] the form in which these analogous bodies of law are expressed is so different that their fundamental similarity can easily be overlooked. We shall now see that these resemblances and differences are reflected in the rules as to the acquisition and loss of ownership and possession, which are either developed or emerge in this and the following period.

The Acquisition and Loss of Ownership and Possession

Possession in English law is prima facie evidence of ownership; and so, though founded on the fact of physical control, it is essentially a right, for it gives to the possessor the rights of ownership. And we have seen that, even in those systems of law in which possession is regarded as something quite distinct from ownership, the fact that it is protected by the law gives it the qualities of a right.[2] From this several consequences follow. Firstly, possession like ownership can be acquired in certain methods and under certain conditions defined by the law; and, once acquired, it can only be lost by some one of these methods.[3] It does not follow therefore that because "a thing is not in anyone's physical control it is not, or on principle ought not to be, in anyone's legal possession."[4] Secondly, capacity to acquire and lose possession, like capacity to acquire and lose ownership, may depend on positive rules of law. Thus we have seen that the law has laid down positive rules that certain persons, such as servants or licensees, though in de facto control, have no possession;[5] and we shall see that, though in modern law there are very few restrictions upon a person's capacity to own chattels personal,[6] such restrictions have existed in earlier law. In mediæval law,

[1] Vol. iii 352-354. [2] Ibid 89. [3] Pollock and Wright, Possession 21-22.
[4] Ibid 22. [5] Vol. iii 363-365; above 461.
[6] See below 483-484 as to alien enemies.

for instance, such persons as the married woman,[1] the monk, the outlaw, the felon, and the traitor could own no property.[2] Thirdly, though two or more persons cannot exclusively possess the same thing,[3] there is no reason why two or more persons should not possess in common or jointly. Generally such possession or ownership in common is governed by much the same rules as those which apply to tenancy in common or joint tenancy of land. Thus the right of survivorship attaches to joint ownership,[4] subject, as we shall see,[5] to special rules as between partners.

The methods by which the ownership and possession of chattels personal can be acquired fall under two main heads :— original and derivative. Generally the methods by which ownership or possession can be lost are correlative to the derivative methods by which they are acquired. The only case not thus correlative is the case where a chattel is wholly destroyed. I shall therefore treat of the acquisition and loss of ownership and possession together.

(1) The original acquisition of ownership and possession.

The various cases in which ownership or possession can be originally acquired can be summed up in the Roman term "occupatio." There are many cases in which the possession of chattels can be so acquired, provided that complete physical control is obtained.[6] The *possession* of land also can be so acquired;[7] but, if we except the anomalous case of general occupancy,[8] it is a method of acquiring *ownership* which is peculiar to chattels. The rules of tenure effectually prevent the possibility of its occurrence in the case of land; for ownership cannot be thus acquired unless the res is nullius;[9] and if a tenant in fee simple dies without heir and intestate, the crown or other lord will take by escheat,[10] while abandonment of the land will not prevent the former owner claiming it within the period allowed by the Real

[1] Vol. iii 526-527. [2] P. and M. i 416, 459-461.
[3] Vol iii 96; above 26.
[4] Litt §§ 281, 321; Bl. Comm. ii 399; Pollock and Wright, Possession 21.
[5] Vol. viii 217.
[6] Young v. Hichens (1844) 6 Q.E. at p. 611 *per* Lord Denman, C.J.; Pollock and Wright, Possess on 37-38.
[7] Vol. iii 93-94; above 25-27; cp. Holden v. Smallbrooke (1680) Vaughan at p. 191, where Vaughan, C.J., points out that such a possessor would have the freehold—though of course the owner could, if he sued in time, recover; he considered the freehold to be merely an abstract thing which "hath its essence by positive municipal law" of which there could be no separate occupancy; as to this idea see below 480 n. 4. [8] Vol. iii 124.
[9] "By the law of England, there is no occupancy by any person of any thing which another has a present right to possess, wherein the law of the land agrees with that of natural occupancy," *per* Vaughan, C.J., Holden v. Smallbrooke (1680) Vaughan at p. 189.
[10] Vol. iii 67-68.

Property Limitation Act.[1] In the case of chattels personal acquisition of ownership by occupatio is, as we shall see, possible; but here, too, the cases in which it is permitted are, for reasons somewhat analogous to those applicable to land, less numerous in English than in Roman law. In fact, we shall see that owing partly to the rights of the crown, partly to the rights of landowners, and partly to special rules of the common law, the list of res nullius is very limited in English law. We have seen that some of the resemblances of the rules of English law to, and some of its differences from, Roman law, had been noted by Bracton.[2] From the days of Bracton onwards the English rules on this topic have naturally become more detailed, more precise, and more numerous.

In one respect, indeed, modern English law has made a new and a wide departure from Roman law. Acquisition by occupatio was extended by Blackstone to cover a case like copyright in which the acquirer has himself created a new incorporeal thing. Blackstone held that he became the owner of it by occupatio.[3] But this really involved a double extension of the original meaning of the term. Firstly, its meaning was extended from the acquisition of an existing res belonging to no one, to the acquisition of a res, which previously had no existence, by the process of creating it. Really this mode of acquisition was as much analogous to specificatio as to occupatio; for specificatio was the mode by which a person acquired a new res by the process of creating it. But it was not precisely analogous; for the Romans contemplated the creation of the new res from two or more existing res, whereas in this case the new res is an entirely new creation. Secondly, its meaning was extended to cover the acquisition of incorporeal rights. Probably chief justice Vaughan's view, that occupatio was only possible of corporeal objects,[4] was in accordance with the Roman idea;[5] for, according to Roman law, occupatio, being founded on possessio, and only corporeal things being capable of possessio, it was only corporeal things which could be thus acquired.[6]

[1] Above 80; for the law as to abandoned chattels which is not dissimilar, see below 495-496.

[2] Vol. ii 273.

[3] Bl. Comm. ii 405-407; below 497; for the history of copyright see vol. vi 364-366, 369, 370, 373-374, 377-379.

[4] "Occupancy by the law must be of things which have a natural existence, as of land or of other natural things which have their being and creation from laws and agreements of man; for there is no direct and immediate occupancy of a rent, a common, an advowson, a fair; a market, a remainder, a dignity and the like," Holden v. Smallbrooke (1680) Vaughan at p. 190; it was on this ground that he considered that of the freehold *qua* freehold there could be no occupancy, above 479 n. 7.

[5] Dig. 41.2.1. 1.

[6] Moyle, Justinian (5th ed.) 219, citing Dig. 41.3.10. 1.

Using the term occupatio in Blackstone's extended sense, it may, I think, be said that possession could or can be originally acquired by this means in the following cases :—(i) The acquisition of free natural elements ; (ii) the property of alien enemies ; (iii) the severance from the soil of plants, trees, or minerals ; (iv) the acquisition of certain animals ; (v) acquisition by finding ; (vi) acquisition by invention. In some of these cases ownership as well as possession was or is acquired by occupatio, and in other cases possession only is acquired. I shall here relate briefly, under these six heads, the history of the law as to the acquisition by occupatio of possession, and, where this was or is allowed by the law, of ownership also.

(i) *The acquisition of free natural elements.*—Of this species of acquisition by occupancy there is little to be said ; for it is self-evident that both the possession and ownership of such elements as light, air, and water can be so acquired. But as Blackstone points out,[1] this must be subject to the proviso that their appropriation or user does not cause a nuisance, or infringe some right which another may have acquired to the enjoyment of these elements in a particular place.[2]

(ii) *The property of alien enemies.*—Justinian's Institutes had laid it down that things captured from the enemy become, jure gentium, the property of the captor.[3] Bracton had paraphrased the passage and laid it down as a rule of English law ;[4] and the question of property in captured goods occasionally makes its appearance in the Year Books. Thus in 1349 Wilby laid it down that, if goods were captured at sea by enemies and recaptured, the persons who recaptured them could not detain them.[5] In 1468 it was said that any man could seize the goods of the king's enemies and take them to his own use ;[6] and Vavisor laid it down that, if a man's property was captured and then recaptured, the recapturer became the owner, and not the king or the admiral or the original owner, unless the original owner came the same day and claimed it before sunset.[7] Brooke reports that it was agreed by the judges in 1545, that the goods of a Frenchman living in England at the time of the outbreak of the war could not be taken ; but that if a Frenchman came here after the outbreak of

[1] Bl. Comm. ii 402-403. [2] Ibid ; vol. iii 155-156 ; above 328-331.

[3] "Ea quæ ex hostibus capimus, jure gentium statim nostra fiunt," Instit. 2.1. 17.

[4] "Habet etiam locum ista species occupationis in his quæ ab hostibus capiuntur," f. 9 ; vol. ii 273.

[5] Y.B. 22 Ed. III. Mich. pl. 63.

[6] Y.B. 7 Ed. IV. Trin. pl. 5 p. 14 = Brooke, Ab. *Propertie* pl. 38.

[7] Ibid ; as Blackstone says, Comm. ii 401, the rule was somewhat analogous to the rule of international law at the time of Grotius as to captures made at sea, "which were held to be the property of the captors after a possession of twenty-four hours."

the war, whether of his own free will or driven here by reason of tempest, or if he surrendered after a fight, anyone could take his goods and become their owner, and that the king had no property in them; "and this rule was applied in this same year (1545) in the war between the English and Scotch; and the king bought divers prisoners and goods from his own subjects the year that Boulogne was captured."[1] These statements made in the Year Books gave rise to various dicta in later books and cases, which asserted the right to acquire property by capture from the enemy. Finch[2] so states the law; and in 1698[3] and in 1748[4] similar statements were made. Blackstone[5] repeats them; but in the next sentence shows that very little was left of the old principle; for he restrains it to "such captures as are authorized by the public authority of the state residing in the crown; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe conduct or passport."

The statements of the common lawyers on this topic have always been scanty, vague, and to a large extent, academic. This was due mainly to two causes.

Firstly, questions of capture from the enemy, whether by sea or land, did not properly come before them. Captures by sea fell to be determined by the court of Admiralty; and, when the Prize and Instance jurisdiction became separate, this question fell exclusively to the Prize jurisdiction, with which, as we have seen, the common law courts refused to interfere.[6] Captures by land fell to the court of the Constable and Marshal; and when that court disappeared, the era of standing armies and military law was at hand.[7] That law regulated the captures made by the members of the army; and the freedom of the country from invasion prevented any question from arising with regard to captures from invading enemies made by other people.

[1] Brooke, Ab. *Propertie* pl. 38, "M. 36 H. 8 fuit agre per Justiciarios que si frenchman inhabit in Anglia, et puis guerre est proclayme inter Angliam et Franciam, nul poet prender ses biens pur ceo que il fuit icy devant, mes si frenchman vyent icy puis le guerre proclaime, soit ceo per son volunte vel per tempest, ou si luy meme yelde et rend, ou estoit a son defence, chescun poet luy arrest et prender ses biens et pur ceo il ad le propertie en eux, et le roy n'avera eux, et issint fuit mise in ure eodem anno inter Anglios et Scotos, et le roy meme achate diverse prisoners et biens eodem anno quant Bullen fuit conquere de ses proper subjets, quod nota bene."

[2] "Goods that belong to an alien enemy anybody may seize to his own use," Law (Pickering's ed.) 178; for this book see vol. v 399-401.

[3] "And it was resolved by the whole court that though, if goods be taken from an enemy, it vests the property in the party taking them by our law; yet by the Admiralty law, the property of a ship taken without letters of mark vests in the King upon the taking," The King v. Broom (1698) 12 Mod. at p. 135.

[4] "At common law the subject in time of war was entitled to the property of whatever he could take from the King's enemies; and we are governed by that and not by the law of nations," *per* Wright, J., Morrough v. Comyns (1748) 1 Wils. at p. 213.

[5] Comm. ii 401. [6] Vol. i 564. [7] Ibid 577-578.

Secondly, both the claims of the crown, and its powers over aliens, prevented the assertion of this right on any great scale. Bracton had admitted, as we have seen,[1] that the application of the principle of occupatio, which he had taken from the Institutes, might be hindered by these claims; and we shall see that in other cases they have caused the rules of English law to diverge widely from those of Roman law on this topic.[2] Hale's view was that the property of an enemy, unless taken in battle, belonged to the king by his prerogative; and, as evidence of this, he says that inquiry into such property was one of the articles of the Eyre.[3] This would put enemy's property in the same category as bona vacantia,[4] and, in practice, restrict the right to obtain the ownership of such property to the soldier. Maynard seems to have maintained this view in 1672 in *The King v. Williamson*,[5] and to have attempted to reconcile it with the older authorities by the assertion that, though the subject seizing the property had a good title against the alien, or, it would seem, against another subject, he had no title against the king.[6] This view is hardly reconcilable with the decision of the judges reported by Brooke in 1545, and the later dicta to the same effect;[7] but no doubt, in practice, the king, being able to effect his seizure first, could make good his claims. In addition, the crown, by virtue of its power over aliens, could prevent subjects from asserting these claims. It was admitted in Henry VI.'s reign that an alien, who came here with the licence and safe conduct of the king, could sue in his courts;[8] and Coke seems to approve of this in *Calvin's Case*.[9] It followed that the king by his licence could prevent a subject from seizing the goods of alien enemies. Gradually it became customary for the crown to extend this licence to all enemy aliens, either for a short time in order to enable them to realize their goods, or indefinitely; and Brooke's statement, that it was resolved that the goods of

[1] Vol. ii 273. [2] Below 490-495.

[3] "Regularly the goods of an enemy, which are found within the king's dominions, do not belong to him that finds them, unless they be taken by him *more hostili;* but they belong to the king as *bona inimicorum*, which is a prærogative belonging to the king, and was enquirable as one of the articles of the Eyre—viz. de catallis Francorum vel Flandrensium vel aliorum inimicorum domini Regis retentis," Hale, Treatise on the Customs, Harg. Law Tracts 246; this article does not appear amongst those printed by Mr. Bolland in the Eyre of Kent (S.S.) i 28-46; but there are many versions of these articles, vol. i 269; and it is quite possible that the king sometimes inserted such a clause—the analogy with bona vacantia was close.

[4] Below 495-496. [5] Freeman, K.B. 40.

[6] "If any subject seize the goods of an alien enemy, he may defend himself against the alien but not against the king. . . . Whensoever a title accrues to the king, at the same time as it does to a subject, there the king's title shall be preferred," ibid; it should be noted that in Atty.-Gen. v. Weeden and Shales (1698) Parker 267, it is only asserted that choses in action belonging to an alien enemy are forfeited to the crown.

[7] Above 481-482 and 482 n. 1. [8] Y.B. 32 Hy. VI. Hil. pl. 5 *per* Ashton.

[9] (1609) 7 Co. Rep. at f. 18a.

enemies residing here at the outbreak of the war could not be seized, looks as if such a licence was coming to be implied.[1] However that may be, it became customary for the crown to declare on the outbreak of war that it would take the persons and estates of enemy aliens residing here into its protection. These declarations, as Foster says, put these enemy aliens on the same footing as aliens who came here by safe-conduct. "They enabled them to acquire personal chattels, and to maintain actions for the recovery of their personal rights in as full a manner as aliens *amy* may."[2] Though the crown might seize the goods of such an alien, such seizure was unusual, though perhaps not actually contrary to the rules of international law;[3] and, as the crown could always prevent any other person from seizing such goods, these seizures came, as Blackstone said, to be "restrained to such as are authorized by the public authority of the state."[4] Thus the right of the private person to acquire such goods by occupatio became obsolete; and the prerogative of the crown having fallen into disuse, enemy property will now, after the conclusion of peace, be restored to its owners, unless there is legislation to the contrary.[5] It follows that any profits made by the use of enemy property must be accounted for to its owners on the termination of the war.[6]

A curious appendage to the rules as to the acquisition of property by capture in war, was the rule that a person had a modified property in a prisoner of war taken by himself, till the agreed ransom was paid.[7] This was the logical consequence of the rules as to ransom which were generally observed in mediæval warfare. But it had a curious development in English legal history. Coke, in *Calvin's Case*, had laid it down that infidels were perpetual enemies,[8] from which it would follow that they might be killed, or, if not killed, be made perpetual prisoners. From this premise, coupled with a reference to the custom of the merchants, it was argued in 1677 that trover would lie for negro slaves; and the court seemed to be of this opinion.[9] Though Holt gave no countenance to this opinion,[10] it perhaps weighed with Yorke and Talbot when they

[1] Above 481.

[2] Crown Law 185-186; and cp. Sylvester's Case (1702) 7 Mod. 150 where the existence of both special and general protections is recognized.

[3] Hall, International Law (6th ed.) 435 and n. 1, citing The Johanna Emilia (1854) Spinks, P.C. at p. 14.

[4] Comm. ii 401.

[5] Daimler Co. v. Continental Tyre Co. [1916] 2 A.C. at p. 347.

[6] Hugh Stevenson and Sons v. Aktiengesellschaft für Carton-Nagen-Industrie [1918] A.C. 239.

[7] Register of Writs f. 102b—trespass for abducting a prisoner whom the plaintiff was keeping till he paid £100.

[8] (1609) 7 Co. Rep. at ff. 17a, 17b.

[9] Butts v. Penny 2 Lev. 201; vol. iii 507-508; according to Hargrave the roll shows that no final judgment was given in this case, 20 S.T. at p. 52.

[10] Vol. iii 507-508; vol. vi 265.

gave it as their opinion that property in slaves would be recognized by English Law.[1] As we have seen, all such notions were finally quashed by Lord Mansfield's decision in *Sommersett's Case.*[2]

(iii) *The severance from the soil of plants, trees, or minerals.*— It was clearly recognized by Bracton,[3] and assumed in the Year Books,[4] that all that was growing on the soil was the property of the owner of the soil—*quicquid plantatur solo solo cedit.*[5] This, indeed, is merely part of the larger principle, *cujus est solum ejus est usque ad cælum.*[6] This maxim is referred to in Croke's reports in 1586, and is there said to be as old as Edward I.[7] This may well be, for, as Professor Goudy has pointed out, one form of it appears in the gloss of Accursius; and it may derived from Irnerius.[8] It is cited by Coke to explain the large extent of things comprehended in the term "land."[9] Used as Coke uses it, it is an apt description of a main principle of the common law, which comes to us from the time when the land law was the most important branch of that law. In fact it has received in English law so wide an application that it operates to give the ownership of things annexed to the land to the owner, even if the land is leased to a tenant, and even if the owner is ignorant of the existence of such chattels. Thus it was laid down by Coke in *Herlakenden's Case*[10] that, "when a man makes a lease for life or years, the lessee has but a special interest or property in the trees, being timber, as things annexed to the land"; and that the lessor is the owner, so that he can take them "as parcel of his inheritance" if they are severed.[11] So it was held that the property in a prehistoric boat,

[1] Sommersett's Case (1771) 20 S.T. at p. 81 *per* Lord Mansfield, C.J.

[2] (1771) 20 S.T. 1; vol. iii 508.

[3] f. 10; vol. ii 274; Bracton and Azo (S.S.) 121.

[4] This is clear from the cases which establish the law as to emblements, which is in the nature of an exception to the general rule, vol. iii 125; above 243; and see Brooke, Ab. *Emblements.*

[5] In the old printed editions of Bracton's text (f. 10a) this maxim appears in the form of the two following hexameters which formed no part of the original text:

> "Quicquid plantatur, seritur, vel inædificatur,
> Omne solo cedit, radices si tamen egit."

The lines occur in Thomas of Marlborough's Chronicon Abbatiæ de Evesham 125, Maitland, Bracton and Azo (S.S.) 121.

[6] For the history of this maxim see Goudy, Essays in Legal History (1913) 229-232.

[7] Bury v. Pope (1586) Cro. Eliza. 118, there it appears as *Cujus est solum ejus est summitas usque ad cælum.*

[8] Op. cit. 230—in this form it appears as *Cujus solum est esse debet usque ad cælum.*

[9] Co. Litt. 4a—Coke's references to the Year Books there cited are incorrect.

[10] (1589) 4 Co. Rep. 62a.

[11] At f. 62b; cp. Mervyn v. Lyds (1553) Dyer 90a; Liford's Case (1615) 11 Co. Rep. at f. 50a; Coke laid it down that this was so, even if the tenant held without impeachment of waste, 4 Co. Rep. at f. 63a; this view was advocated by Bacon, Works vii 538 seqq.; and accepted by Hardwicke as the original rule of the common law, Aston v. Aston (1749) 1 Ves. Sen. at p. 265; but the contrary view, i.e. that the

dug up by a lessee, was in the owner of the soil, though he was ignorant of its existence till his lessee dug it up.[1] This case, indeed, is a striking illustration of the manner in which the large rights of landowners have diminished the number of cases in which an original acquisition of chattels is possible in English law. As Sir F. Pollock has pointed out,[2] "the Roman lawyers who required a possidendi affectus directed to the specific thing would have dealt with this case differently." They would probably have said that it was a res derelicta, of which the finder became the owner by occupatio.[3]

It is clear from this case that the extent of the rights of the owners of the land to the chattels growing on, or otherwise annexed to it, has affected the law as to the acquisition of ownership by severance from the soil. Indeed it may, I think, be said that these rights have been the dominant factor in shaping the law on this topic.

When such things as plants or trees or minerals are severed from the soil, they cease to be merely a part of the soil, and begin to exist as separate chattels.[4] The question of the ownership of these separate chattels therefore arises. To decide this question English law has evolved the following principles:—If the things in question are lawfully severed, ownership is acquired by the person who severs them. Thus, if the land is in the occupation of the owner, the owner, by severing them, begins both to possess and to own them as separate chattels. Similarly, if the land is in the occupation of the tenant who lawfully severs them, he acquires both the possession and ownership by such severance; and in certain cases the doctrine of emblements has extended the tenant's rights beyond the term of his tenancy, and makes him the owner of crops sown by him during that term, but reaped after its expiration.[5] If they are unlawfully severed, the ownership vests in the owner of the land. Thus, if they were unlawfully severed by a trespasser, it was laid down by Prisot, C.J., in Henry VI.'s reign that they belonged to the owner of the soil.[6] The same principle was applied by Coke in *Herlakenden's Case* to the tenant.[7] The

tenant has in this case the property in the trees severed, was laid down in Lewis Bowles's Case (1616) 11 Co. Rep. at f. 84a; and this view has been followed, Pyne v. Dor. (1765) 1 T.R. 55; and see generally 2 Swanst. 170 note.

[1] Elwes v. Brigg Gas Co (1886) 33 C.D. 562; cp. South Staffordshire Water Co. v. Sharman [1896] 2 Q.B. 44.

[2] Pollock and Wright, Possession 42, citing Digest 41.2.3.3 and 41.2.44 pr.

[3] Instit. 2.1.47; Dig. 41.7.2.1.

[4] Y.B. 35 Hy. VI. Mich. pl. 3 *per* Littleton.

[5] Vol. iii 125; above 243.

[6] Y.B. 35 Hy. VI. Mich. pl. 3—"Si un coupe certain herbes en mon clos le property [i.e. the possession] touts fois demeurt en moy usque ils sont caries hors la terre."

[7] "If the lessee or any other severs them from the land, the property and interest of the lessee is thereby determined, and the lessor may take them as things which were parcel of his inheritence, and in which the interest of the lessee is determined," 4 Co. Rep. at f. 62 b.

only case in which there has been any doubt was the case of the disseisor. Of this case I must say something because it illustrates the manner in which, in the Middle Ages, the rights of an owner were attributed to the person seised.[1]

If the owner of land were disseised, and the disseisor reaped the crops, he was clearly in possession; and there was a good deal of authority in favour of the view that, by virtue of a principle analogous to the doctrine of emblements, he became the owner; so that, according to this view, if the disseisee re-entered, he did not become the owner of the crops. But, by the end of the mediæval period, this opinion had been overruled. Even though the disseisor had sown the land his seisin was from the first tortious, and therefore the disseisee, on his re-entry, was adjudged to be in the same position as if he had been continuously seised. Even then, however, it appears from the Year Book of 14 Edward IV. that there was some doubt as to the law if the disseisor had not only reaped the crops, but also removed them from the land.[2] It is clear that in such a case the disseisee, though he was the owner, would not regain possession by re-entry. Brooke seems to be somewhat uncertain as to his position. He admits that he is the owner; but he questions his right to retake the things severed, because it is as difficult to identify them as to identify money.[3] But clearly a disseisor no more becomes owner by such severance than a tenant who unlawfully severs; and it is equally clear that the fact that he has removed the things severed cannot, as Prisot, C.J., pointed out in 1457,[4] affect the owner's rights. It follows, therefore, that the disseised owner has the same rights as any other owner to retake the things if he can identify them, or to sue by action of trover or trespass. Thus, in this as in other cases,

[1] Vol. iii 91-92.

[2] Brooke, Ab. *Emblements* pl. 10 = Y.B. 15 Ed. IV. Trin. pl. 11; pl. 12 = Y.B. 37 Hy. VI. Mich. pl. 12; the position is summed up by Brooke in pl. 20 = Y.B. 14 Ed. IV. Trin. pl. 4 as follows:—"Nota per *touts les Justices* del common banke, si le disseisor embley le terre, et eux severa, et les lessa giser sur le terre, le disseisee reenter, il les avera, et e contra s'ils ussent estre caryes hors del terre, mes per le reporter le diversitie in tempore passe ad este qui si fueronnt annexe al terre quant le disseisee enter, il eux avera et e contra s'ils sont severes, et per *Littlelon* si le desseisor succide l'arbres et eux emport, uncore disseisee poet eux prendre, quod *Choke* negavit." Littleton's view was also the view of Prisot, C.J., Y.B. 35 Hy. VI. Mich. pl. 3, and it prevailed, as, on logical grounds, it deserved to prevail.

[3] "Si le disseisse re-entra il eux avera, quære s'ils sont removes extra terram illam in aliam terram si le disseisse poet eux prender, car propertie ne poet estre conus d'eux, nyent plus que de money, quære inde," Brooke, Ab. *Propertie* pl. 47 = Y.B. 5 Hy. VII. 17.

[4] "Et aussi si home coupe arbres en ma terre et eux importe jeo puis eux reprendre. . . . Et meme la ley, si on prend certain biens de moy," Y.B. 35 Hy. VI. Mich. pl. 3; this seems to be admitted by Coke in Herlakenden's Case 4 Co. Rep. at f. 62b, cited above 486 n. 7, where no distinction is drawn between an unlawful severance by a lessee and by anyone else.

the growing recognition of the rights of ownership tended to diminish the privileges of seisin divorced from ownership.

The result is that it is only the owner of land, or the tenant who lawfully severs, who can originally acquire the ownership of crops, trees, minerals, or anything else, by severance.

Conversely possession and ownership are lost, if a thing, which once existed as an independent chattel, becomes merged in or permanently annexed to the land—for instance if a plant or a tree is set and becomes rooted in my land, or any other chattel is affixed to it.[1] The hardship of this rule has produced much law on the topic of "tenants fixtures"; and it has been the cause of many provisions in successive Agricultural Holdings Acts.[2] It should be noted, however, that the title of the new owner to such things is not original, but derivative. In such cases he has generally either taken the thing from a former owner, or has acquired it by the act of such owner. The rights of the former owner to compensation (if any) obviously depend on the circumstances under which his ownership has been lost.

(iv) *The acquisition of certain animals.*—The development of the law as to the acquisition of ownership and possession of animals has been complicated by many diverse influences. The main distinction is that between tame animals which are capable both of possession and ownership by private persons, and animals feræ naturæ which are in no one's possession. In the law both as to tame animals and as to animals feræ naturæ, we can see traces of those rules of Roman law which Bracton had copied or adapted. In the law as to tame animals we can see traces of old ideas as to the capacity or incapacity of certain animals to be the subject of private ownership. In the law as to animals feræ naturæ the Roman rules have been obscured, and in the end practically abrogated, by the rights of the Crown and other franchise holders, and by the rights of landowners.

The law as to the ownership and possession of tame animals does not, at the present day, present any marked difference from the law as to the ownership and possession of any other chattel. Their ownership and possession can only be acquired originally in the same way as any other chattels. On the other hand, the original acquisition of the ownership and possession of animals feræ naturæ does present some peculiar features. But as the history of the legal principles relating to both these classes of

[1] "Jeo pose que si il fait des arbres un maison, or jeo ne puisse reprendre, pur ce qu'ils sont a le frank tenement annexes al terre," per Prisot, C.J., 35 Hy. VI. Mich. pl. 3; Herlakenden's Case (1579) 4 Co. Rep. at ff. 63b, 64a; cp. Spark v. Spicer (1699) 1 Ld. Raym. 738, where Holt, C.J., ruled that "if a man be hung in chains upon my land, after the body is consumed, I shall have the gibbet and chain."

[2] Above 286.

animals has marked peculiarities, and as the contrasts and the similarities in the evolution of these two sets of allied principles help towards the understanding of both, I shall here deal with the history of the law as to both these classes of animals.

(*a*) Tame animals. It is possible that there was a time when the only animals in which property was recognized were those which were useful for draught or food.[1] But it is clear that from an early date (perhaps under the influence of Roman law),[2] it was recognized that property could exist in animals feræ naturæ which had been tamed.[3] But the influence of the old ideas remained; and as late as 1521 it was argued that no property could exist in tamed animals, the only use of which was to give pleasure to their owners.[4] It is clear, however, that by that date some of the judges were beginning to revise their definition of the sort of usefulness which would suffice to allow a person to have property in a tamed animal. Brooke, J., pointed out[5] that the fact that such animals were not the subject of larceny, did not prevent them from being the subject of private ownership, if they were in anyway useful to mankind. He started from the first beginning of recorded history. "At the beginning of the world," he said, "all the beasts were obedient to our first father Adam . . . but after he had broken the commandment of our Lord God, all the beasts began to rebel and to be wild, and that was the punishment of his crime; with the result that now they were common, and occupanti conceduntur, as birds in the air, fishes in the sea, and beasts on the earth; and when I have taken fowls and by my industry have made them tame through the restraint on their liberty, now I have a special property in them, because they are made obedient to me by my labour, and then it is not lawful for any one to take them; as deer in my park, or fish in my pond—but otherwise if they are in a river. So it is as to a tame beast which I use in my house; but otherwise if they are at large. For if I have a singing bird, though it be not pecuniarily profitable, yet it refreshes my spirits and gives me good health, which is a greater treasure than great riches. So if anyone takes it from me he does me much damage for which I shall have an action."

By the end of the sixteenth century it was fully recognized

[1] Thus Eliot argued, Y.B. 12 Hy. VIII. Trin. pl. 3 (f. 4), that there could be no property in a dog, "car chien est un vermin, et sauvage du nature, car in Latin il est appell *fera* et nemy *jumentum nec averium:* car averia sont proprement tiels bestes qui sont *feræ naturæ* et sauvages, mes sont pliables, et sont aptes pur sustenance de home come brebis boeuffs et autres, et pur eux on aura action."

[2] Bracton f. 9 copies the Roman rule as to "animalia fera facta mansueta," Bracton and Azo (S.S.) 101.

[3] Y.B. 43 Ed. III. Mich. pl. 2.

[4] Y.B. 12 Hy. VIII. Trin. pl. 3.

[5] Ibid at p. 4.

that beasts might become the subject of property by the industry of man.[1] It was recognized also that this broad principle applied to any beasts, irrespective of the use to which they were put; and it is probable that this extension was helped by a reliance on mercantile custom, which, as we have seen, was at that period beginning to exercise a liberalizing influence on the rules of the common law. Thus, when to an action of trover for one hundred musk-cats and sixty monkeys, it was objected that it had not been shown that they were tame, the objection was not allowed, "for they are merchandize and valuable, and so it is of an action for a parrot."[2] We have seen that mercantile custom was also invoked to prove that a person could have property in negro slaves,[3] and that it was long uncertain whether or not such a mercantile custom would be upheld.[4] As I have already pointed out,[5] the common law control of mercantile custom was never more beneficiently exercised than when it refused to allow it to establish this large encroachment on personal liberty.

(*b*) Animals feræ naturæ. The law as to the original acquisition of the ownership and possession of animals feræ naturæ has, at different periods, been affected by four different sets of influences. Those influences are (*a*) the Roman rules as to the acquisition of such animals, (*β*) the rights of the crown, (*γ*) the rights of landowners, and (*δ*) the Game Laws enacted in the interest of the larger landowners. All these influences have combined to make the history of this branch of the law very complex.

(*a*) Bracton repeats the Roman rule,[6] that animals feræ naturæ are res nullius, and therefore "occupanti conceduntur." But then he goes on to say that all these wild animals are the property of the crown.[7] If the latter statement were taken literally it would of course deprive the Roman rule of all effect.[8] But, in

[1] "By industry as by taking them, or by making them *mansueta* . . . but in those which are *feræ naturæ*, and by industry are made tame, a man hath but a qualified property in them *scil.* so long as they remain tame, for if they do attain to their natural liberty and have not *animum revertendi*, the property is lost," The Case of Swans (1592) 7 Co. Rep. at f. 17b; this was clearly recognized in many other cases of this period, see e.g. Ireland v. Higgins (1593) Cro. Eliza. at p. 126 *per* Tanfield.

[2] Grymes v. Slack (1611) Cro. Jac. 262.

[3] Butts v. Penny (1677) 2 Lev. 201; above 484.

[4] Vol. iii 507-508; above 484-485.

[5] Vol. v 146.

[6] "Feræ igitur bestiæ et volucres et pisces, id est omnia animalia, quæ in terra mari cælo nascuntur, simulatque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupanti conceditur," Instit. 2. 1. 12.

[7] "Jure autem gentium sive naturali dominia rerum adquiruntur multis modis. In primis per occupationem eorum quæ non sunt in bonis alicujus, et quæ nunc sunt ipsius regis de jure civili et non communia ut olim: sicut sunt feræ bestiæ volucres et pisces," f. 8b.

[8] Maitland, Bracton and Azo (S.S.) 103 says, "it is very hard to read his text without believing him to hold that, if franchises conceded by the king be left out of account, every wild animal, bird, fish belongs to the king."

spite of Blackstone's support of this view in respect to game,[1] there is no reason to think that this was ever the law of England. The king may, it is true, have claimed that he was the owner of all wild animals, just as he may have claimed to be the owner of all mines;[2] but just as his claims over mines came to be limited to mines of a special kind,[3] so his claims to wild animals came to be limited to a few varieties, such as swans and whales;[4] and, even in these cases, his rights were subject to all sorts of qualifications and limitations.[5] But, just as in the case of his rights over mines, the crown assumed the right to give special franchises to miners and to mining districts;[6] so in the case of animals feræ naturæ, he assumed special privileges in regard to their capture, and gave to others analogous, but more limited, privileges. With these special privileges, which were summed up in the law of the Forest, and the minor franchises of chase and warren, I have already dealt.[7] They have, as we shall see, affected the right of acquisition to certain animals feræ naturæ; but, since they did not, as a rule, affect the rights of landowners to capture such animals as long as they were at large on their land,[8] these rights of capture were left unaffected. Therefore, in order to define the effects of such capture, recourse was had to the Roman rules, so that, in spite of Bracton's statement, these rules have exercised some influence on the development of the law on this topic. But their influence was so limited in earlier law by the royal privileges and the franchises granted by the crown, and in later law by the growing rights of landowners, that their practical effect in modern law is, as we we shall see, comparatively small.

(β) It seems to have been settled in the Middle Ages that the forest law gave the crown the right to take the beasts of the forest;[9] and that, similarly, the owner of a chase, warren, or park, had the right to take the beasts of the chase or warren in the chase or warren, and the beasts in the park.[10] Further, the forest law gave the crown extensive rights against those who interfered with the beasts of the forest; and the Legislature assisted the

[1] Blackstone's view, Comm. ii 415, 419, was that it was only the king or the owners of the franchises of chase or warren who could acquire property in these animals while they were living, or who could kill them, see vol. i 101; and something like this view seems to have been held by Walmesley, J., in Bowlston v. Hardy (1597) Cro. Eliza. at p. 548; and perhaps by Bayley, J., in Hannam v. Mockett (1824) 2 B. and C. at p. 941; but it may be noted that the views of Bayley, J., in that case were not approved by Willes, J., in Read v. Edwards (1864) 17 C.B.N.S. at p. 258.

[2] As to mines see vol. i 152.

[3] Ibid 152-153.

[4] The Case of Swans (1592) 7 Co. Rep. at ff. 16a, 16b; Bl. Comm. ii 409-410; Forsyth, Cases on Constitutional Law 178-179.

[5] The Case of Swans.

[6] Vol. i 152-153.

[7] Ibid 95-108.

[8] Ibid 101 n. 7.

[9] Ibid 96; as to what were beasts of the forest, see Select Pleas of the Forest (S.S.) x-xiv.

[10] Ibid 100-101.

owners of chases, warrens or parks by special remedies against trespassers.[1] But neither the crown[2] nor anyone else[3] had possession or full ownership of the animals therein till they were captured. Their right was simply a right to take them in the area of the forest, chase, warren or park. It was, as Coke said, merely a qualified property;[4] and, if the beast escaped, this qualified property disappeared.[5] However, while the beast was in the forest chase or warren, the crown or other franchise owner had this qualified property, whether or not the land belonged to the crown or other franchise owner;[6] and if the king or other franchise owner started the beast within the area of the forest or franchise, and killed it outside such area, he would become the owner.[7] Hence such beasts could, as Coke said,[8] and as Holt, C.J.,[9] allowed, be acquired by such persons *ratione privilegii*, if they were beasts of forest, chase or warren. This principle was admitted in 1827 in the case of beasts of warren;[10] and no doubt it would still be true with regard to forests and chases, if these franchises still exist. As we shall now see, the growing emphasis laid upon the rights of landowners to take the animals on their land *ratione loci*, has made the mode of acquisition *ratione privilegii* a mode of acquisition of gradually diminishing importance.

(γ) There are one or two hints that, in the opinion of some, ownership of a forest chase or warren, unlike ownership of land, gave to the crown or other franchise owner the property in the beasts therein.[11] But it was quite clearly settled in the fifteenth century that this was not the case. The wild beasts, whether in

[1] Vol. i 96, 100-101.

[2] Brooke, Ab. *Propertie* pl. 20—"*Per Newton* quant beastes sauvages le roye aler hors del forest, le propertye est hors del roy, et sic videtur que le roy ad propertie in eux quant ils sont in le forest," citing a Y.B. of 7 Hy. VI.

[3] Y.BB. 3 Hy. VI. Trin. pl. 34; 22 Hy. VI. Trin. pl. 11 *per* Moile.

[4] The Case of Swans (1592) 7 Co. Rep. at f. 17b.

[5] Ibid; above n. 2.

[6] Vol. i 101.

[7] "Homme peut prendre bestes enfuant hors de son several," Y.B. 6 Ed. II. (S.S.) 132; Y.B. 12 Hy. VIII. Mich. pl. 2 (p. 9) *per* Newport and Brook *arg.*, and *per* Brooke, J.

[8] The Case of Swans (1592) 7 Co. Rep. at f. 17b.

[9] Sutton v. Moody (1698) 1 Ld. Raym. at p. 251.

[10] Duke of Devonshire v. Lodge (1827) 7 B. and C. at p. 39 *per* Lord Tenterden, C.J.; cp. Fitz-Hardinge v. Purcell [1908] 2 Ch. at p. 168 *per* Parker, J.

[11] Y.B. 22 Hy. VI. Trin. pl. 11, Moile drew a distinction between rabbits in a warren and deer in a park, which the owner of the warren or park could call "his"; and rabbits or deer elsewhere, which the owner of the land could not call his; but the court denied the distinction; in Y.B. 18 Ed. IV. Mich. pl. 12 Brian, C.J., considered that a man had sufficient property of the deer in his park to be able to make a gift of one of them; this view also seems to be hinted at by Marowe (Oxford Studies in Social and Legal History vol. vii) when he says at p. 390, "Si une home soit endite pur ceo que il avoit pris tilx bestez queux sont Feer de natur come hertes, fesaundes, dere et hujus modi, ceo nest bone sinon que ils sont prisez hors de ascun parke, Forest, warrein queux sount liberties par graunt le Roie, et doncques est bon."

the forest, chase, warren or park or elsewhere were res nullius. They were in nobody's possession;[1] but the owner of the franchise *ratione privilegii*, or the owner of the land *ratione loci*, had a qualified property, which entitled him to take them.[2] Thus an owner could not bring an action of trespass and claim the beasts as "his," i.e. in his possession.[3] He could only claim the beasts as "his" if they were too young to move themselves from his land,[4] i.e. as Coke puts it, he could only claim possession *ratione impotentiæ*.[5] Even if a beast strayed from the forest, the king lost his qualified property in it;[6] and a fortiori this happened in the case of lesser persons. The only modification admitted was in the case where the owner of the land or franchise started a beast on his own land, and killed it on the land of another.[7] In that case the beast was his. It is clear, therefore, that, by the end of the mediæval period, the law is coming to take the view that, though the possession of wild animals is in no one, either the landowner, or the owner of some franchise which entitles him to take them, has a qualified property in them. Necessarily, as the forest law and these franchises of chase and warren declined in importance, greater stress came to be laid upon the rights of landowners. It was clearly laid down in 1598 that the property in the rabbits on the soil belonged to the owner of the soil;[8] and in 1611 that, in an action of trespass, the landowner could claim the rabbits as "his."[9] But it should be noted that, just as in the case of timber,[10] so in the case of wild animals which fell under the term "game," they belonged, not to the tenant for a limited interest, but to the owner of the freehold for an estate in fee simple.[11]

(δ) The Game laws, which, as we have seen,[12] limited the right to take wild animals defined as game to the owners of land of a certain yearly value, confirmed the rights of these landowners, and gave them additional protection—just as in the Middle Ages, the grants of the rights of chase park and warren had given them additional protection of a similar sort. The decision in 1865, in the case of *Blades v. Higgs*,[13] to the effect that game chased and

[1] Y.BB. 3 Hy. VI. Trin. pl. 34; 12 Hy. VIII. Mich. pl. 2 *per* Brooke, J.; 14 Hy. VIII. Mich. pl. 1 *per* Pollard.
[2] Y.B. 12 Hy. VIII. Mich. pl. 2 *per* Brooke, J.
[3] Y.BB. 16 Ed. IV. Mich. pl. 8; 18 Ed. IV. Mich. pl. 12.
[4] Y.BB. 49 Hy. VI. Mich. pl. 10 *per* Bingham; 12 Hy. VIII. Mich. pl. 2 (p. 11) *per* Brooke, J.
[5] The Case of Swans (1592) 7 Co. Rep. at f. 17b.
[6] Above 492 n. 2.
[7] Above 492.
[8] Boulston's Case (1598) 5 Co. Rep. 104b.
[9] Newton and Richard's Case (1611) Godbolt 174.
[10] Above 486.
[11] Bellew v. Langdon (1601) Cro. Eliza. 876; Hadesden v. Gryssal (1608) Cro. Jac. 195; Rigg v. The Earl of Lonsdale (1857) 1 H. and N. 923.
[12] Vol. i 107-108.
[13] 11 H.L.C. 621.

killed on A's land by a trespasser is A's property, and that it could therefore lawfully be recaptured by A's servants, is the logical result of the trend, both of the judicial decisions, and of the legislation of the preceding three centuries.

Under these circumstances it is clear that very little is left, either of the Roman principle that animals feræ naturæ are res nullius, and belong to the captor; or of the principle, which Bracton put forward and Blackstone was half inclined to accept, that the property in such animals is in the crown.[1] The crown's rights *qua* crown have disappeared; and have given place to the rights of the landowners, who, in addition to their rights as landowners, to some extent were given the privileged position formerly occupied by the crown. The Roman rules have been followed only so far as to allow that the possession of such animals is in no one; but, in so far as these rules assert that the property in such animals is in no one, they have been decisively rejected. The property is held to be in the owner of the land on which the animals are. It follows that there can be no original acquisition of the ownership of such animals by occupatio, except by the landowner, or by one to whom he has given the right to take the animals. All that a trespasser will acquire by such occupatio will be the possession of the animals; and, as the result of his taking this possession, he converts the qualified property of the landowner into an absolute property.

At the same time it is possible that both the old rights conferred by the franchises of chase and warren, and the rules of Roman law, have left their traces in the shape of modifications of these general principles. Firstly, it is, as we have seen, possible that owner of a franchise of warren may have *ratione privilegii* the rights to take beasts of warren on land not his own.[2] Secondly, it may be that Roman rules have left their mark in the two following cases: (i) There is authority for saying that if A, a trespasser, starts a beast on the land of X and kills it on the land of Y, the property of the beast is in A.[3] This is not wholly consistent with the ratio decidendi of *Blades v. Higgs*, as Lord Chelmsford pointed out[4]; but it is a logical deduction from the principle that X's property is lost so soon as the beast leaves his land, unless he himself started it and killed it on Y's land; and that a beast hunted on to Y's land does not, while being hunted, become Y's property.[5] These principles it is clear owe something to the

[1] Above 490 n. 8, 491 n. 1. [2] Vol. i 101.

[3] Above 492; Sutton v. Moody (1698) 1 Ld. Raym. 250; Bl. Comm. ii 419; Churchward v. Studdy (1811) 14 East 249.

[4] 11 H.L.C. at pp. 639, 640.

[5] "The property belongs not to the owner of the first ground, because the property is local: nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it, though guilty of trespass against both owners," Bl. Comm. ii 419.

Roman idea that wild animals are res nullius. (ii) There is authority for the statement that in animals feræ naturæ, not recognized as articles of food, destructive in their habits, and not protected by Act of Parliament, there can be no property *ratione soli*.[1] But, having regard to the case of *Blades v. Higgs*,[2] this proposition is, to say the least, doubtful. It is clear that these exceptions cover very little ground, and are either of very uncommon occurrence, or rest upon doubtful authority. It follows, therefore, that very little is left of the Roman principle that ownership (as distinct from possession) of animals feræ naturæ can be acquired by occupatio.

(v) *Acquisition by finding.*—That the finder of chattels thereby gets possession is obvious. In Roman law he acquired also ownership, if the chattels had been thrown away by their former owner with the intention of abandoning his ownership.[3] Bracton repeats the Roman rule that things thus abandoned are "in nullius bonis"; and then he goes on to enumerate certain kinds of these things—treasure trove, wreck, and waif—which, though formerly the property of the finder "jure naturali," "jam efficiuntur principis jure gentium."[4] To this list of things we must add the property of a person who has died intestate and without next of kin.[5] All of them make up the class of bona vacantia, and go to the crown by virtue of the prerogative.[6] The rights of the crown, therefore, have very considerably curtailed the number of things belonging to no one, the ownership of which could be acquired by occupatio. They are still further curtailed by the rights of landowners who, as we have seen, are entitled to all things found on their property which are not claimed by the owner.[7] In fact there is some authority for saying that an owner does not, as in Roman law,[8]

[1] Hannam v. Mockett (1824) 2 B. and C. 934. [2] (1865) 11 H.L.C. 621.

[3] "Si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum effici," Instit. 2.1.47.

[4] "Dicuntur etiam res in nullius bonis esse quae habitae sunt pro derelicto. Item tempore dicuntur res nullius esse ut thesaurus. Item ubi non apparet dominus rei, sicut de wrecco maris. Item de his quae pro weyvio habentur, sicut de averiis, ubi non apparet dominus, et quae olim fuerunt inventoris de jure naturali; jam efficiuntur principis de jure gentium," f. 8; as Maitland says, Bracton and Azo (S.S.) 97, Bracton probably meant to apply the last sentence to waif, stray, wreck, and treasure trove; for definitions of waif and stray see Bl. Comm. i 286-288, and for wreck and treasure trove see vol. i 86 n. 7, 560 n. 3; Bl. Comm. i 280-284, 285-286; cp. Foxley's Case (1601) 5 Co. Rep. 109a.

[5] "In laico autem decedente ab intestato, deficientibus consanguineis et uxore, succedet fiscus," Lyndwood Provinciale 180, cited Dyke v. Walford (1846) 5 Moo. P.C.C. at p. 494.

[6] "Note that a certain one was convicted for that he kept four silver spoons which he had found. So to prison with him because he shewed it not to the bailiffs. If no one can give proof of ownership the goods are to be confiscated," the Eyre of Kent (S.S.) i 146; Bl. Comm. i 288-289.

[7] Above 486.

[8] "Pro derelicto autem habetur, quod dominus ea mente abjecerit, ut id rerum suarum esse nollet, ideoque statim dominus esse desinit," Instit. 2.1.47.

lose his ownership of a chattel even by the intentional abandonment of its possession;[1] and, if this is the case,[2] it is clear that the finder does not become the owner by taking possession of it. This is a somewhat curious rule; but, owing to the common law theory of ownership and possession, it causes no such inconvenience as it would have caused in Roman law. A person who takes possession under such circumstances has, by virtue of his possession, all the rights of an owner except as against the former owner;[3] and if the former owner has really abandoned his ownership, the possessor is in substance the owner; for he has the rights of an owner as against all the world. Provided therefore that the thing is not of such a sort, and has not been abandoned in such a manner, that the crown's prerogative rights come into play; and provided that the rights of the owner of the land on which the thing has been found do not intervene, the finder who takes possession, will in substance acquire ownership.[4] In this one case there may be an original acquisition of ownership by finding; but it is clear that it arises from and depends upon the results of the common law doctrines of ownership and possession, and is wholly independent of the very different Roman doctrines as to res derelictæ.

(vi) *Acquisition by invention.*—The Roman rule,[5] that the maker of a new species from another person's materials became the owner of that species, was recognized as a rule of English law at the end of the fifteenth century.[6] "If," said Marowe, "one delivers goods to another to keep safely, and the bailee changes the form of these goods, as he can do of plate and such like things, in that case if the bailor afterwards takes them with felonious intent, that is felony, though these goods were originally his own goods,

[1] "There is no such law in this realm of England for goods forsaken: for though a man waive the possession of his goods, and saith he forsaketh them, yet by the law of the realm, the property remaineth still in him, and he may seize them after when he will," Doctor and Student Bk. ii c. 51; "A man cannot relinquish the property he hath to his goods unless they be vested in another," Haynes Case (1614) 12 Co. Rep. 113; cp. Pollock and Wright, Possession 124.

[2] In Brown v. Mallet (1848) 5 C.B. 599, and White v. Crisp (1854) 10 Exch. 312, the fact that the owner can abandon a wrecked ship seems to be assumed, if not expressly decided, see especially the latter case at p. 322 *per* Alderson, B.; but these cases may be explained, either on the ground that abandonment will exempt from liabilities which attached to the owner while in possession (Pollock and Wright, Possession 124), or on the ground that such abandonment is permitted, and indeed is common, in the case of wrecked ships, though not necessarily in the case of other chattels.

[3] Above 449.

[4] Chitty, Prerogative 152, cited vol. i 86 n. 7; the passage is cited with approval by Farwell, J., in Attorney-General v. Trustees of the British Museum [1903] 2 Ch. at pp. 608-609; a good illustration of the application of these principles is to be found in the case of The Tubantia [1924] P. 78—see the judgment of Duke, P., at pp. 89-90.

[5] Instit. 2.1.25.

[6] Brooke, Ab. *Propertie* pl. 23 = Y.B. 5 Hy. VII. Hil. pl. 6.

but the property was changed by the change of form."[1] But it would seem from later cases that the common law has departed from the Roman rule—the test being not, as in Roman law, whether or no a new species has been made which cannot be resolved into its component parts; but whether the maker previously owned a principal part of the material.[2] As we have seen, the acquisition both of copyright and of patent rights could (in the absence of legislation) be regarded as an original method of acquisition, depending upon a mixture of the principles of occupatio and specificatio.[3] But in modern English law both are now regulated by and depend upon express legislation which prescribes the conditions of their acquisition.[4]

It will thus appear that the working of the principles of the common law relating, firstly, to the rights of the crown and the rights of landowners, and, secondly, to the principles of ownership and possession, have reduced to very small dimensions the number of cases in which an original acquisition of ownership is possible. At the outset, no doubt, the law on this topic owed something to the principles of Roman law which Bracton had copied and adapted. But, even when he was writing, they required, as he recognized, some adaptation to fit them to English facts; and the elaboration of the principles of the common law has caused such Roman rules as he borrowed to be almost eliminated; with the result that such cases of the original acquisition of property as are still possible have come to rest on foundations which are almost entirely native. We must now turn to the much more important topic of the derivative acquisition of ownership and possession.

(2) The derivative acquisition of ownership and possession.

Derivative methods of acquiring ownership and possession fall under two heads, according as the acquisition is by some act inter vivos or mortis causa. Methods of acquisition mortis causa, in so far as they relate to legatees, donees mortis causa, and those entitled on intestacy, were not originally regulated by common law rules, but by the rules developed by and applied in the ecclesiastical courts. I have spoken of the origins of some of these rules in the preceding Book of this History;[5] and of their later developments I shall speak in a later Book. Here I shall deal mainly with the

[1] Oxford Studies in Social and Legal History vii 376.

[2] Anon. (1560) Moore (K.B.) 20; Anon. (1594) Popham 38; below 502-503; Blackstone, Comm. ii 404-405, cites these cases as if they bore out the Roman rule, which they do not.

[3] Above 480.

[4] For copyright see vol. vi 364 seqq.; for patent rights see vol. iv 344-354; vol. vi 330-331.

[5] Vol. iii 546-547, 556-563.

acquisition of ownership and possession by some act inter vivos. I shall enumerate the most important of these methods, and say something of the evolution of some of the more important common law doctrines to which they have given rise.

The main distinction between the derivative methods of acquiring ownership and possession is, and always has been,[1] between a possession acquired without the consent of the true owner, and possession acquired with his consent—between a taking and a delivery; and, in respect to chattels, as in respect to land, the rule holds that, while "delivery is favourably construed, taking is put to strict proof."[2] I shall therefore say something, in the first place, of taking; and, in the second place, of delivery. Thirdly, I shall say something of a number of miscellaneous methods of acquisition which can be grouped under the general head—operation of law.

(i) *Taking.*

The person who takes chattels from the possession of another will of course always get possession; but, unless the chattels are taken with the consent of the owner who intends to allow the taker to acquire ownership, the taker does not acquire ownership. Such taking, in fact, always amounts to a trespass, and may amount to the criminal offence of larceny.[3] The owner may, it is true, retake his goods in another's possession;[4] but this is not a case of acquiring ownership by taking, for the taker is by hypothesis the owner. Moreover, we have seen that, even if the chattels have been really or apparently lost, the taker acquires no ownership; and, according to the circumstances attendant upon or supervening after the taking, his act may amount to theft, or expose him to a civil action at the suit of the owner.[5] But, in some cases, such taking may be justified either by the act of the owner, or by the law. Of these cases, and of the history of the law relating to them, I propose, in the first place, to say a few words. In the second place, I propose to say something of the cognate case, where a taker has added or mixed the goods taken to or with his own property.

(*a*) It was quite clearly settled, at the end of the fifteenth century, that if a man took the chattels of another by his licence, he could not be sued as a trespasser, even if he abused the licence by damaging the goods. On the other hand, if he took the goods, by the authority of the law, e.g. in case of distraint, a subsequent abuse of the authority would make him a trespasser *ab initio.*[6]

[1] Vol. ii 79-80, 110; vol. iii 319.
[2] Pollock and Wright, Possession 14; above 26.
[3] Pollock and Wright, Possession 126.
[4] Vol. iii 279-280.
[5] Above 410, 411-412; see Pollock and Wright, Possession 171-187.
[6] Y.BB. 21 Ed. IV. Hil. pl. 22; 22 Ed. IV. Hil. pl. 15 *per* Brian, C.J.; Perkins, Profitable Book §§ 190, 191.

The first part of the rule is really the natural and logical consequence of the limitations of the action of trespass. If a man takes the chattels of another by his licence, the chattels have been voluntarily handed over to one who is either a bailee or a licensee; and, as we have seen, the action of trespass was never available to a man who had thus voluntarily parted with possession.[1] The second part of the rule is not so obvious; and its origin, its reasons, and its limitations, have a somewhat curious history.

There is little doubt that the rule originated in the law of distress.[2] We have seen that, from a very early period, a lord who had wrongfully distrained was regarded as having committed a trespass or an offence analogous thereto.[3] We have seen too that if a lord had distrained, and the tenant brought his replevin, the action of replevin would originally have been stopped by a claim on the part of the lord to be the owner of the chattels; and that, in such a case, the tenant could proceed against the lord, either by action of trespass, or appeal of larceny.[4] Thus the law was familiar with the idea that any irregularity in the particular form of taking under the authority of the law known as distress would expose the distrainor to an action of trespass. Such irregularity, in other words, caused the whole proceedings to be regarded as tortious from the start, and entitled the aggrieved party to bring this action.

By the beginning of the fifteenth century this principle had been generalized, and extended to other cases in which entry on property or taking of chattels was permitted by the law. Thus in 1410[5] a lessor justified an entry on his lessee to discover whether or no he had committed waste. But it appeared that he had not only entered, but had remained there the whole day and the following night. Hill, J., said, "though by the law the entry was good and lawful . . . still the remaining on the premises was not, and seeing that that was done contrary to the first intent, we must adjudge that all shall be adjudged wrongful, and the cause of his entry shall be intended to be to remain there all night, and not to look into the question of waste"; and Thirning, C.J., further illustrated the point by a reference to the case of a person abusing his right of entry to an inn, in which statement of the law Hankford, J., concurred. The principle was treated as quite well settled at the end of the century;[6] and Coke was abundantly justified in stating, in

[1] Vol. iii 323; above 421-424; cp. Y.BB. 13 Ed. IV. Pasch. pl. 5 *per* Brian, C.J.; 16 Hy. VII. Mich. pl. 7; Ames, History of Trover, Essays A.A.L.H. iii 429, 430.

[2] Ames, Essays A.A.L.H. iii 428-430; cp. Bordwell, H.L.R. xxix 382 *note*.

[3] Vol. iii 283, 285.

[4] Ibid 284, 319-324.

[5] Y.B. 11 Hy. IV. Trin. pl. 16.

[6] Y.BB. 9 Hy. VI. Trin. pl. 34; 21 Ed. IV. Hil. pl. 22; 22 Ed. IV. Hil. pl. 15 *per* Brian, C.J.; 5 Hy. VII. Hil. pl. 2.

The Six Carpenters Case in 1611, that "where entry, authority, or licence is given to anyone by the law, and he abuses it, he shall be a trespasser ab initio."[1]

The reasons for the rule must be looked for in two marked characteristics of the mediæval common law. Firstly, we have seen that the common law, both in the Middle Ages and in the sixteenth and seventeenth centuries, was fully convinced that it could not decide questions as to the intention with which an act was done—"the thought of man is not triable." It could only infer the intent from the act; and if the act was wrongful the intent must be inferred to be also wrongful.[2] If therefore an authority was in fact abused, it must be considered that the entry was made with intent to abuse it, and therefore was ab initio wrongful. This idea comes out in Hill, J.'s statement in 1410,[3] and is very well expressed by Coke. "The reason of this difference," he said, "is that in the case of a general authority or licence of law, the law adjudges by the subsequent act *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta*."[4] Secondly, the common law has always been careful to provide remedies against abuses of authority which may lead to the oppression of the subject. We have seen that it was for this reason that it carefully guarded against those irregularities in that law of distress in which this doctrine took its rise;[5] and this was one reason for the severity of its rules against abuses of authority by such officials as sheriffs and bailiffs.[6] Therefore the extension of this principle from the law of distress, to cover all cases in which a public authority had been abused, came very naturally to it.

The history of the limitations of this principle is curious. There can be little doubt that, at the outset, any infringement of the elaborate rules which hedged about the law of distress would make the offender a trespasser ab initio.[7] Such infringement might take the form, either of a positive act of misfeasance such as a destruction of the chattels distrained, or of a nonfeasance such as a refusal to deliver them up. But when the principle became extended beyond the region of distress, and when it had come to be settled that, to constitute a trespass, a positive act of misfeasance must be proved, it was laid down that a man could not be held liable as a trespasser ab initio if his misconduct amounted to mere nonfeasance. Thus it was said by Littleton that a mere refusal to give up cattle distrained could not give rise to an action of trespass, but that to ground such an action some positive act of misfeasance, such

[1] 8 Co. Rep. at ff. 146, 146b.
[2] Vol. iii 374, 375; vol. iv 481-482; vol. viii 434, 448.
[3] Above 499.
[4] 8 Co. Rep. at f. 146b.
[5] Vol. iii 283.
[6] Vol. ii 449; vol. iii 387.
[7] Ibid 283 n. 2; Ames, Essays A.A.L.H. iii 428-429.

as killing them or working them, must be shown.[1] We have seen that, during the sixteenth century, the expansion of the action of trover had given rise to much consideration of the question of the difference between a positive act of misfeasance, which would amount to a conversion and enable this action to be brought, and a mere nonfeasance which did not amount to a conversion, for which the action would lie;[2] and that the question had arisen whether a wrongful refusal to deliver on request could be classed as a misfeasance which amounted to a conversion. We have seen that in *Isaack v. Clark* it was held that a refusal by a finder or bailee to deliver on request was not such a misfeasance as would constitute a conversion;[3] but that later in the century, this opinion was overruled.[4] Both in *The Six Carpenters Case*[5] and in *Isaack v. Clarke*[6] the same principle was adhered to. In the former case it was held that the refusal of a guest at an inn to pay for his wine could not make the guest a trespasser ab initio, because "not doing is no trespass."[7] This statement of the law has not, like the similar statement in *Isaack v. Clarke*, been overruled. The result is that a refusal is sufficiently an act of misfeasance to constitute a conversion, but not to give rise to the doctrine of trespass ab initio. Thus, "a landlord who accepted the rent in arrear, and expenses, after impounding a distress, and then retained possession of the goods distrained, was held guilty only of a *non feasance*, and therefore not a trespasser *ab initio*, though probably liable for a conversion of the goods to his own use."[8] Thus the line between misfeasance and nonfeasance has been drawn at a different place in the actions of trespass and conversion respectively—a striking illustration of the difficulty of deciding under which of these two categories any given case of misconduct falls.

(*b*) Blackstone classes the modes of acquisition known as *accessio* and *confusio* under the head of occupatio;[9] but it would seem that, if the accessio has arisen from other than natural causes,[10] and if the accessio or confusio has taken place without the consent[11]

[1] Y.B. 33 Hy. VI. Trin. pl. 12; cp. Y.BB. 13 Ed. IV. Hil. pl. 2 *per* Littleton, J.; 12 Ed. IV. Pasch. pl. 22 (p. 9) *per* Catesby *arg.*, and Littleton, J.

[2] Above 405-410. [3] Above 412. [4] Above 412-413.

[5] (1611) 8 Co. Rep. 146a. [6] (1615) 2 Bulstr. 306.

[7] "It was resolved per totam Curiam that not doing cannot make the party who has authority or licence by the law a trespasser *ab initio*, because not doing is no trespass," 8 Co. Rep. at f. 146b.

[8] 1 S.L.C. (10th ed.) 133, citing West v. Nibbs (1847) 4 C.B. 172.

[9] Comm. ii 404-405.

[10] As to the accessions to land from natural causes see vol. ii 273-274, 286 n. 1; above 485; the same principle applies to give the owner of animals their progeny or produce, Pollock and Wright, Possession 125; the latter case is not a case of original acquisition because the product, before its severance, is in the possession of the person who possesses the animal, and if another takes such progeny or produce, "the act of severance is a taking from his possession," ibid.

[11] If the confusio has taken place by the consent of the owners different principles are applicable; in this case and also where there has been an accidental or

of the person to whose property the substance has been added or with which it has been mixed, they are really cases in which one man has taken another's property and dealt with it in an unauthorized manner. In other words, one man has taken another's property and added it to or mixed it with his own.

This point of view came very naturally to the common law, which looked at all these questions of the possession and ownership of chattels from the point of view of the law of tort. And, if the question is looked at from this point of view, there can be little doubt what answer shall be given to the question, Who is the owner of the product? The person who has made the "accession" or the "confusion" is a trespasser, and the owner can sue for the entire product or its value. Thus in 1490[1] the case of specificatio was distinguished; and it was said that "in any case in which the thing can be identified, there the person (owning it) can take it, notwithstanding the fact that something else has been joined to or mixed with it. For instance, if one takes a piece of cloth, and makes for himself a gown, the person (owning it) can take it back again well enough." This principle was followed in 1594;[2] and in 1615 Coke, C.J., thus stated the principle:[3] "In this case the law is, that if J. S. have a heape of corne, and J. D. will intermingle his corne with the corne of J. S., he shall have all the corne, because this was so done by J. D. of his own wrong. . . . And if this should be otherwise, a man should be made to be a trespasser nolens volens, by the taking of his goods again, and for the avoiding of this inconvenience, the law in such a case is, that he shall now retain all."

The treatment by Roman lawyers of this problem is very different because they looked at it from the point of view, not of the law of tort, but of the law of property. The remedy of the owner was by a real action in which the question of ownership was at issue; and therefore they regarded, not so much the wrong done by taking another's property and adding to it or mixing with it something of one's own, as the question who was entitled to the product thus increased in value. Much subtle reasoning, and some over refined distinctions, resulted from this manner of looking at the problem. Some of it was, as we have seen,[4] repeated by Bracton; but in these cases, as in the various cases of the original acquisition of ownership and possession,[5] the evolution of English

inadvertent admixture, the several claimants share in common, Bl. Comm. ii 405; Smurthwaite v. Hannay [1894] A.C. at p. 505.

[1] Y.B. 5 Hy. VII. Hil. pl. 6. [2] Anon. Popham 38.

[3] Warde v. Ayre (1615) 2 Bulstr. 323; and this is accepted as the rule both at law and in equity, see Lupton v. White (1808) 15 Ves. 432; Re Oatway [1903] 2 Ch. at p. 359.

[4] Vol. ii 273-274. [5] Above 480, 481 seqq.

law, under the pressure of the development and expansion of the forms of action, has worked out its own solution on native lines. That solution may appear somewhat rough and ready to the civilian; but in practice it is neither inconvenient nor unjust. We have seen that the owner of the thing to which additions have been made, or with which other things have been mixed, is the owner of the resulting chattel or collection of chattels; and that he, as owner, can retake or retain that which he owns.[1] But, as we have seen, he has no real action—no vindicatio—in which he can demand the specific restitution of "his" chattel. He can only demand damages for its detention in an action of trover and conversion.[2] It is true that in modern law the court may order the restitution of the chattel; but this is a matter for judicial discretion; and, by exercising its discretion to give or withhold such restitution, the court can give effect to the dictates of substantial justice.[3] Thus, to take Sir John Salmond's illustration, "if A takes the marble of B, and makes a statue of it, B will ask in vain for specific restitution, and will be left to his claim for damages amounting to the original value of the marble."[4] In this, as in other cases, the accidents of the historical development of the common law have enabled it to stumble upon what is probably the best solution of a difficult legal problem. As Sir John Salmond has said,[5] "the modern continental codes have largely abandoned the conclusions of Roman law, but the rules established in substitution are so vague and unsatisfactory as to lead irresistibly to the conclusion that English law is wise in treating the matter as one for the exercise of judicial discretion, and not for the application of fixed principles."

(ii) *Delivery.*

We have seen that, subject to the two exceptions of the contracts of sale and exchange and of the gift by deed, an actual delivery was, in the Middle Ages, and still is, as necessary for a transfer of chattels as it was formerly necessary for a transfer of land.[6] Moreover it is clear, as Sir F. Pollock has shown, that the common law throughout its history has demanded an actual, and not merely a symbolic delivery.[7] The delivery of a key of the safe or warehouse, where the goods to be transferred are deposited, is not a symbolic delivery; "it is argued," said Lord Hardwicke, "that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of symbol is

[1] Above 501-502. [2] Vol. iii 322.

[3] Salmond, Torts (3rd ed.) 339; presumably, as the owner of the thing taken is the owner of the thing plus the things added to or mixed with it, the former owner of the things added to, or mixed with it would have no claim for compensation, as Salmond suggests, ibid; the cases cited, above 502 n. 3, seem decisive as to this.

[4] Ibid. [5] Op. cit. 339 n. 9. [6] Vol. iii 353-354.

[7] Pollock and Wright, Possession 60-70.

sufficient; but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England which required delivery throughout." It is true the delivery of the key of bulky goods "has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing, and therefore the key is not a symbol which would not do."[1] It is true that the law admits a traditio *brevi manu* by parol, when the chattels are already in the possession of the transferee.[2] It is true also that, in the case of a sale, the law admits certain cases of constructive delivery, in which there may be a change of possession or ownership without actual delivery. For instance, a seller in possession may assent to hold the thing sold as the bailee or servant of the buyer; or by the agreement of the vendor, purchaser, and a third person in whose custody the things are, the third person may agree to hold on behalf of the purchaser; or a buyer in possession as bailee, may, as the result of the contract, begin to hold as owner.[3] But it is clear that in these cases there is no symbolic delivery. Rather there is an agreement as to the character in which possession is held, or as to the whereabouts of the possession or ownership, adapted to the special circumstances of the parties to the particular transaction.

There are also certain other cases, unconnected with the contract of sale, which admit of a similar explanation. Thus, it is not inconsistent with the rule requiring actual delivery, to allow that a dispossessed owner may by parol release his rights to the person who has taken them—though, as we have seen, even this principle was not fully established till the latter part of the sixteenth and the earlier part of the seventeenth centuries.[4] Nor is it inconsistent to allow that a man may by parol give to another the right to take his chattels, and to hold that, on the taking of the chattel in pursuance of this licence, the licensee becomes the owner. This principle seems to have been admitted as early as 1369,[5] to have been recognized in 1506,[6] and to have been decided to be good law in

[1] Ward v. Turner (1752) 2 Ves. Senr. at pp. 442-443.

[2] Vol. iii 354, and cases cited in n. 4.

[3] Pollock and Wright, Possession 71-75; something more will be said of these rules when, in a subsequent Book, I trace the history of the contract of sale.

[4] Above 456; we have seen that a parol release to a bailee was recognized as an effectual delivery in the fifteenth century, vol. iii 354 n. 4.

[5] Y.B. 42 Ed. III. Mich. pl. 3—action of trespass for trees cut and carried away; plea that the plaintiff gave them to the defendant; the plaintiff's counsel then demanded judgment because the defendant had no evidence of the gift save his own averment; *Finchden*, *J.*, "si un home atache un chival ou un vache, il ne besoigne mie d'aver fait de ceo, per que *nec hic*, et pur ceo avises vous si vous voilles demurrer"; the plaintiff's counsel did not dare to demur, but traversed the gift.

[6] "Si jeo done a un home ma vache ou mon cheval, il peut prendre l'un on l'auter a sa election: et la cause est, maintenant per le done le propriete est en luy, et ce de l'un ou de l'autre a sa volonte," *per* Rede, J., Y.B. 21 Hy. VII. Hil. pl. 30 (p. 18);

Flower's Case[1] in 1598. The report of the last mentioned case runs as follows: "A borrowed 100 pound of F, and at the day brought it in a bagg and cast it upon the table before F, and F said to A, being his nephew, I will not have it, take it you and carry it home with you. And by the Court that is a good gift by parole being cast upon the table. For then it was in the possession of F, and A might well wage his law. By the Court, otherwise it had been, if A had only offered it to F, for then it was chose in action onely, and could not be given without a writing." That this is the correct interpretation of the principle underlying this case is made quite clear by the court of Appeal in *Cochrane v. Moore.* Fry and Bowen, L.JJ., say of it,[2] "the court seems to have held that delivery was necessary, but that by the casting of the money on the table, it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew—so that the nephew might wage his law, i.e. might conscientiously swear that he was not indebted to his uncle."[3]

We have seen that, in the thirteenth century, a delivery of possession was essential to the validity of all gifts of chattels; but that, before the end of the mediæval period, two exceptions had been made to the generality of this principle—firstly the contract of sale, and secondly the conveyance by deed.[4] In both these cases it was settled that the ownership of chattels might be conveyed without delivery. We have seen, too, that in 1890 the court of Appeal decided, in the case of *Cochrane v. Moore*,[5] that these were the only two exceptions admitted by the common law. This decision settled a long controverted question whether or not there was a third exception, in the case of gifts of chattels made without deed.[6] Probably, for the reasons which I shall now give, this decision was historically correct.

There are a considerable number of authorities, from the middle of the fifteenth century downwards, which may be interpreted as affirming the validity of a gift of chattels without delivery. I shall,

as to this dictum see the remarks of the court of Appeal in Cochrane v. Moore (1890) 25 Q.B.D. at p. 70, and Sir F. Pollock's comment L.Q.R. vi 447; Sir F. Pollock, I think rightly, differs from the interpretation put on this passage by the court of Appeal, and considers that it simply "asserts the right to take the cow or the horse at the donee's election"; in other words, when the election is made and the horse is taken, there will in substance be a delivery, and the gift will be absolute and perfect: before that time, though perhaps good for some purposes, it is not valid against the donor and so not absolute, below 508-509.

[1] Noy 67.

[2] (1890) 25 Q.B.D. at p. 71.

[3] A comparatively recent application of this principle may be seen in Kilpin v. Ratley [1892] 1 Q.B. 582; cp. re Stoneham [1919] 1 Ch. at pp. 155-157.

[4] Vol. iii 354-358.

[5] (1890) 25 Q.B.D. 57.

[6] On this subject see generally Solicitors' Journal xxxv 725 seqq.; L.Q.R. vi 446 seqq.

in the first place, state shortly the effect of these authorities; and, in the second place, show why they cannot be interpreted as affirming the validity of these gifts.

(i) The authorities, which can be cited in support of the proposition that a gift of chattels without delivery is valid, can be divided into two divisions—those which occurred before the decision of *Irons v. Smallpiece*[1] in 1819, and those which occurred after. (*a*) Of the first set of authorities perhaps the earliest is the Year Book of 2 Edward IV.[2] In that case Laicon, *arguendo*, said, "I put the case that I give you my goods which are at York, and before you take possession, a stranger takes them, will you not have a writ of trespass against the stranger? Yes, Sir, you will, for by the gift the property is now in you, and the possession by the writ is adjudged to be in you presently"; and to this Danby, C.J., seems to have assented. At the beginning of the following century Perkins asserts that all chattels real or personal can, as a general rule, be given without deed; "and therefore if a man give unto me his horse or cow, or a bowe or a launce, or other such like thing, such gift is good by word."[3] In 1615, in the case of *Wortes v. Clifton*, Coke, C.J., used words which are capable of being interpreted as affirming the validity of such gifts;[4] in 1628, in the case of *Hudson v. Hudson*, Hyde, Dodderidge, Jones, and Whitelocke repeated in substance the law laid down in the Year Book of 2 Edward IV.;[5] and later in the century Jenkins asserted that "a gift of anything without a consideration is good: but it is revocable before the delivery to the donee of the thing given."[6] It seemed to follow from these authorities that a gift without delivery must, if not absolutely valid, have at least some effect. Therefore when Lord Tenterden, C.J., in the case of *Irons v. Smallpiece*, decided that, "by the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift or there must be actual delivery of the thing to the donee,"[7] the wide terms in which the rule was laid down aroused

[1] 2 B. and Ald. 551.

[2] Y.B. 2 Ed. IV. Mich. pl. 26; see for one reading of this report Cochrane v. Moore (1890) 25 Q.B.D. at p. 68; and for another and more probable interpretation L.Q.R. vi 448.

[3] "Now is to shew, what things may be granted or given without deed, and what not. And as to that, know, that all chattels reals or personals, may be granted or given without deed, if not that it be in speciall cases. And therefore if a man give unto me his horse or cow, or a bowe or a launce, or other such like thing, such gift is good by word," Perkins, Profitable Book § 57.

[4] "Le civill ley est que un done des biens nest bon sans tradition mes auterment est en nostre ley," 1 Rolle Rep. at pp. 61-62.

[5] "Si un home en Londres done a moy ses biens en York, si un auter prist eux, jeo avera trespass," Latch 214; the same dictum is also repeated S.C. at p. 263.

[6] Jenkins 109.

[7] (1819) 2 B. and Ald. at p. 552; in Cochrane v. Moore (1890) 25 Q.B.D. at p. 61, the court says, "these observations of the chief justice have created some difficulty.

a good deal of criticism, which has considerably obscured the law on this subject. (*b*) Williams, in his notes on Saunders' reports, was somewhat critical of the decision in *Irons v. Smallpiece*, pointing out that the main authority cited for it was a case of a donatio mortis causa. He admitted, indeed, that a donor who had made a parol gift could revoke at any time before delivery; but he pointed out that neither this rule, nor the decision in *Irons v. Smallpiece*, was necessarily inconsistent with the principle laid down by the older authorities, to the effect that a donee by a parol gift could thereby acquire special property sufficient to enable him to maintain an action against a wrongdoer.[1] Serjeant Manning went a good deal further. He denied the correctness of the decision, on the ground that it rested upon a mistaken application of the rule as to gifts mortis causa to gifts inter vivos.[2] His view was that a gift inter vivos made without deed was perfected by the acceptance of the donee, though there had been no delivery.[3] It seems probable that both Parke, B.,[4] and Maule, J.,[5] were inclined to concur in this view of the law; and it was the foundation of the decisions by Pollock, B., in 1883[6] and by Cave, J.,[7] in 1885, to the effect that a gift of chattels without deed and without delivery might be valid, if there was a clear intention on the part of the donor to give, and on the part of the donee to receive.

(ii) The reasons why, in spite of these authorities, the decision of the court of Appeal in *Cochrane v. Moore* should be regarded as historically correct may be summed up as follows:

(*a*) We have seen that the reason why a contract of sale and a deed were allowed to convey the ownership in chattels without delivery, originated in the rules which regulated the rights of the parties to a contract to bring the actions of debt and detinue.[8] If A contracted with B to sell him a specific chattel, and if B had paid the price or A had conveyed the chattel, B could in the first

What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift inter vivos, he was probably in error; but if in speaking of the transfer of property by gift, he included gifts by will as well as gifts inter vivos, then by instrument he meant testamentary instrument, and his language was correct."

[1] "It does not follow that the case of Hudson v. Hudson is overruled; for it may still be held that a donee, by a parol gift, acquires such a special property as to be able to maintain an action against a mere wrong doer, though the donor may resume the thing given," 2 Wms. Saunders 47 n.

[2] 2 M. and Gr. 691 n.

[3] "After acceptance of the gift by parol, and until disclaimer of the gift by deed, the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift," ibid; and see 1 C.B. 379 for another note by the same author to the same effect.

[4] Ward v. Audland (1847) 16 M. and W. at pp. 870-871; Flory v. Denny (1852) 7 Exch. at p. 583; Oulds v. Harrison (1854) 10 Exch. at p. 575.

[5] (1845) 1 C.B. at pp. 381-382.

[6] Danby v. Tucker 31 W.R. 578.

[7] Re Ridgway 15 Q.B.D. 447.

[8] Vol. iii 354-358.

case bring detinue against A for the chattel or its value, and A in the second case could bring debt against B for the price. Thus, as a result of the contract, B got a right to the possession of the chattel enforceable by the action of detinue. From this the inference was easy that B got "the property" as the result of the contract; for, as we have seen, such a right to possession is recognized as "property" in the Year Books. The same result followed if A contracted under seal to sell a specific chattel to B; for in such a case B, whether he had paid the price or not, could probably sue by writ of detinue. But it is clear that this reasoning will not apply to a unilateral promise to give, not under seal. In such a case the promisor has no right of action, since he has nothing to sue for; and consequently the promisee, who has given no *quid pro quo*, has no right. It follows that the promisee has no right to the possession—no "property"—such as the purchaser has. If, therefore, this view of the historical origin of these two exceptions be accepted, it raises a presumption against the admission of this further exception which, if it existed, could not be explained on this ground. At any rate, it is clear that if this further exception is admitted, it must rest upon some other ground; for it is difficult to suppose that it arose as a purely arbitrary exception to the established rule. But, so far as I know, if it exists, no satisfactory explanation of it has been suggested. It follows that another explanation of the authorities, which seem at first sight to sanction this exception, is more likely to be correct.

(*b*) All these authorities admit of several explanations, which will prevent them from being authorities for the proposition that a parol gift is good without delivery. One explanation, which is possible owing to the lack of precision with which this supposed exception is stated in the earlier authorities, is that in some of them, e.g., the Year Books of 2 Edward IV and 21 Henry VII., and the cases of *Wortes v. Clifton* and *Hudson v. Hudson*, the gift may well have been by deed;[1] while in others, e.g. the dictum in Perkins, it is not said that delivery is not necessary.[2] But probably the best explanation is that given by Williams in his notes to Saunders' reports,[3] and amplified by Sir F. Pollock.[4]

[1] See Cochrane v. Moore (1890) 25 Q.B.D. at pp. 68, 69, 70.

[2] Above 506 n. 3. [3] Above 507 n. 1.

[4] "On principle it would seem that where A, by word of mouth, purports to give B a certain chattel, this will have the effect of a licence to B to take that chattel peaceably wherever he may find it. . . . The licence is no doubt revocable until executed. . . . What is the position of A and B towards strangers before B has acquired possession? It seems to be something like that of a bailor and bailee at will. B has an immediate right to possession, revocable indeed at his will, but sufficient to give him a right of action against a stranger who takes the thing without colour of right. Whether he could bring trespass as well as trover may be doubtful. If his position

These authorities point out that the Year Books of 2 Edward IV. and 21 Henry VII., the case of *Hudson v. Hudson*, and the dictum cited from Jenkins, do not state that such a gift is absolutely good. Indeed Jenkins expressly says that the donor may revoke before delivery.[1] They are thinking, not of the question whether or not such a gift is absolutely good, but of the question of the rights of such a donee against third persons who have wrongfully interfered with the chattel. As against a mere wrongdoer such a donee might well have a right to maintain trespass or trover.

(*c*) It seems to me that the later cases, which take the view that these authorities support the proposition that there can be a valid parol gift without delivery, are all based upon the view which serjeant Manning took of these authorities. That view, for the reasons which I have explained, does not seem to me to be a necessary conclusion from these authorities; and, in support of this opinion, there is the decision in *Irons v. Smallpiece*,[2] and, as the court of Appeal pointed out in *Cochrane v. Moore*,[3] a long line of modern cases which have fully accepted the correctness of that decision.[4]

The result is that though a parol gift may, so long as it stands unrevoked, give to the donee rights of action against mere wrongdoers who interfere with the chattel given, such a gift does not pass the ownership of the chattel. Hence it is true to say that, unless the parties have entered into a contract of sale or have employed a deed, the property in chattels cannot be conveyed by the owner without delivery.

(iii) *Operation of Law.*

Under this head it will be sufficient to enumerate a few instances of the many methods in which, at different periods of English legal history, the ownership and possession of chattels could or can be acquired and lost by special rules of law.

Some of the earliest of these rules relate to the prerogative rights of the crown—such as the crown's rights to bona vacantia, catalla felonum, waifs, strays, wreck, royal fish, and minerals. Of these matters I have already spoken when dealing with the subject of occupatio, as these rights have to a large extent

can be put as high as that of a vendee entitled to immediate possession, trespass might well lie. And as against a mere wrongdoer, there appears no good reason why this should not be so," L.Q.R. vi 446.

[1] Above 506; Sir F. Pollock thinks that when Jenkins said the gift is good he must, as is shown by the context, have meant good as against third persons, L.Q.R., vi 447.

[2] (1819) 2 B. and Ald. 551.

[3] (1890) 25 Q.B.D. at pp. 61-62.

[4] Reeves v. Capper (1838) 5 Bing. N.C. 136; Shower v. Pilck (1849) 4 Exch. 478; Bourne v. Fosbrook (1865) 18 C.B.N.S. 515; Douglas v. Douglas (1870) 22 L.T.N.S. 127.

restricted the operation of that principle in English law.[1] Analogous to these prerogative rights is, as Blackstone points out,[2] the crown's title to the produce of the revenue, hereditary or otherwise, which is vested in it by the common law or special statutes. To this head also may be ascribed the title of an executor or administrator to the property of a deceased person.[3]

Later and different illustrations of the working of this principle are to be found, as we shall see, in the rules of mercantile law. The Roman conception of ownership, as an abstract right, was made familiar to English lawyers by the legal renaissance of the twelfth and thirteenth centuries;[4] and though, as we have seen,[5] that conception has never been completely acclimatized in the common law, yet the common law has acquired a conception of ownership which is different from that better right to possess which was the dominant theory in the Middle Ages.[6] Moreover, the common law had, from its earliest days, firmly grasped the theory that a man cannot convey a better right than he has got. But the rigid application of this theory was soon found to be incompatible with the proper working of the mechanism of commerce. The old rules as to the effect of a sale in market overt, which are still part of the law, are an early illustration of this truth;[7] and the growth of the law as to negotiable instruments,[8] and statutory modifications of the law as to factors,[9] and as to vendors and purchasers of goods,[10] have introduced other similar modifications. In all these cases the man who gets a good title, notwithstanding the defects in the title of the person from whom he acquired, may be said to get his ownership, partially at any rate, by virtue of a special rule of law, statutory or otherwise. These special rules of law have in effect partially reintroduced the old idea "mobilia non habent sequelam,"[11] in the form of the maxim current in the French commercial law of the eighteenth century—"en fait de meubles possession vaut titre." The idea embodied in both maxims is the same; but its basis, as thus reintroduced into modern law, is very different; for it rests now, not upon the character of the movables and the nature of the legal remedies for their recovery, but upon mercantile convenience and necessity; and, on that account, it is accompanied by a requirement of good faith in the acquirer, which was wholly unknown to primitive bodies of law.[12]

[1] Above 495.
[2] Comm. ii 408.
[3] Vol. iii 566, 569.
[4] Ibid 77, 90-91.
[5] Ibid 92, 93-95; above 458-459.
[6] Above 62-63, 426-429.
[7] Vol. v 104-105, 110-111.
[8] Vol. viii 146 seqq.
[9] 52, 53 Victoria c. 45 (The Factors Act, 1889).
[10] 56, 57 Victoria c. 71 (The Sale of Goods Act, 1893) § 25.
[11] Vol. ii 79-80.
[12] For the French maxim see Brissaud, Histoire du droit Francais ii 1213 and n. 5; M. Brissaud says, ibid ii 1214, "Ainsi se termina, par un réaction dont il ne faut pas

Other cases, in which ownership or possession can be acquired by operation of law, rest upon the working of the machinery of judicial process. We may recall such instances as goods sold in pursuance of a writ of execution,[1] goods sold by order of the court pending a litigation, and the effect upon the title to goods of the satisfaction of a judgment given for their value in an action for their recovery.[2] In other cases the title arises by the provisions of express statutes, such as the Bankruptcy Acts or various Revenue Acts.[3] But we should remember that, in the case of chattels personal, the operation of the statute of Limitation does not confer a new title, or even extinguish the old title of the former owner; but that it merely bars the former owner's right of action.[4] These statutes, therefore, do not confer either ownership or possession. The utmost that they do is to make the position of an actual possessor more secure, by making it impossible for the owner or the man who has a better right to possession, to assert his rights by action, and probably by making it illegal to retake the goods by force.[5]

The only case falling under this head, of which it is necessary at this point to speak in any detail, is the particular possessory lien of the common law. Such a lien exists when a person, to whom the possession of goods has been delivered for a special purpose, is allowed by law to retain the possession of the goods, till all his charges in respect of them have been paid.

The origin of this right to retain possession must be sought in those rules of the common law which placed certain persons holding certain positions, or carrying on certain trades, under certain specific duties.[6] Thus a person who had the franchise of waif and stray was obliged to keep the strayed animal, and to hand it over to the owner if he claimed it within a year and a day.[7] It seems, therefore, to have been assumed in 1371 that, if the owner claimed it, the person who had taken it as an estray could retain it till a sufficient sum had been offered for its keep.[8] By the latter half of the fifteenth century this principle had been

chercher la raison ailleurs que dans les besoins du commerce, l'évolution de notre ancien droit en matière de propriété mobilière. Il rompit avec la tradition romaine, apres l'avoir acceptée à peu près complètement, et dans une certaine mesure, fit retour au passé, mais dans un esprit bien différent de celui qui inspirait la législation primitive: témoin la différence inconnue autrefois entre le possesseur de bonne et le possesseur de mauvaise foi."

[1] Halsbury, Laws of England xxii 402.

[2] Ex parte Drake (1877) 5 C.D. at p. 871.

[3] E.g. when smuggled goods are forfeited, 39, 40, Victoria c. 36 § 177; or in the case of certain breaches of the excise laws, 7, 8 George IV. c. 53 § 32.

[4] Above 464. [5] Pollock and Wright, Possession 115.

[6] Vol. ii 464-466; vol. iii 385-386, 448.

[7] Constable's Case (1601) 5 Co. Rep. at f. 107b.

[8] Y.B. 45 Ed. III. Pasch. pl. 30.

extended to innkeepers who were bound to entertain any traveller who applied to them;[1] and later for the same reason to common carriers.[2] In such cases it was held, early in the seventeenth century, that, even where the goods deposited in the inn or handed over to the carrier were not the property of the guest or the consignor, the innkeeper or the carrier could retain them for his charges as against the owner;[3] and this is still the law.[4]

But, as early as the middle of the fifteenth century, this principle was being extended. It was laid down in 1466 and 1483 that persons, such as tailors, who had done work on chattels delivered to them for this purpose, could retain them till their charges were paid;[5] and the principle was very broadly asserted by Brooke,[6] and accepted by Coke.[7] It seems also to have been agreed in 1463, that the unpaid seller of goods could retain possession till the price was paid, in the absence of any special agreement to give credit.[8] But the generality of the principle thus asserted, has been gradually defined by the application of the rules, that the work done must have improved the chattel,[9] and that the possession of the person asserting it must be exclusive.[10] Moreover they differ from the earliest class of possessory liens in one important respect. It is now settled that liens thus created by work done on goods by persons who were not, like innkeepers or carriers obliged by law to do it, cannot be maintained against the claim of the owner, unless the work was done at his request, or at the request of someone authorized by him.[11] All these liens are, however, alike in the character of the right conferred by them. Though there was some uncertainty in the case of the innkeeper,[12] it seems to be now settled that the right of the person

[1] Y.BB. 5 Ed. IV. Pasch. pl. 20; 22 Ed. IV. Hil. pl. 15 *per* Brian, C.J.

[2] Skinner v. Upshaw (1702) 2 Ld. Raym. 752; Yorke v. Grenaugh (1703) ibid, at p. 867 *per* Holt, C.J., dissentiente Powell, J.

[3] Robinson v. Walter (1617) 3 Bulstr. 269 (innkeeper); Yorke v. Grenaugh (1703) 2 Ld. Raym. at p. 867 *per* Holt, C.J. (carrier).

[4] Robins v. Gray [1895] 2 Q.B. 501.

[5] Y.BB. 5 Ed. IV. Pasch. pl. 20; 22 Ed. IV. Hil. pl. 15 *per* Brian, C.J.

[6] "Vide libro Rastel, que stuffe, mise al taylor, fuller, shereman, weever, miller et hujusmodi, ne seront distreine, car ceux artificers sont pur le commun weale. Et eadem lex alibi de equo in communi hospitio, mes tiels artificers poent reteigner le stuffe pur lour wages pur lour labour," Brooke Ab. *Distresse* pl. 70.

[7] Six Carpenters Case (1611) 8 Co. Rep. at f. 147.

[8] "Et meme le ley est si jeo achate de vous un cheval pur XXs: vous reteignerez le cheval tanque vous estes pay de les XXs, mes que jeo paiera a vous a Michaelmas prochein ensuant, icy vous ne deteignerez le chival tanque vous estes pay etc.," *per* Haydon *arg.* Y.B. 5 Ed. IV. Pasch. pl. 20.

[9] Nicholson v. Chapman (1793) 2 Hy. Bl. 254.

[10] Chapman v. Allen (1632) Cro. Car. 271-272; Jackson v. Cummins (1839) 5 M. and W. 342.

[11] Hollis v. Claridge (1813) 4 Taunt. 807.

[12] In Robinson v. Walter (1617) 3 Bulstr. at p. 270 Montague, C.J., thought that the innkeeper could sell a horse who had eaten as much as he was worth; and Popham, C.J., was of the same opinion, The Case of an Hostler (1606) Yelv. at p. 67;

who has a lien is only to retain, and that he has no right to sell.[1]

It is on this basis that the law as to liens rests. But, in later law, it has been extended in many different directions. Mercantile and professional usage has given rise to general liens in certain trades and businesses; and such liens can also be created by the course of dealing between persons in particular trades, or by express agreement. Equity also has adopted the idea of a lien. But it has given to it the wholly different meaning of a charge upon the property of another until certain claims are satisfied. It is not founded on the possession of the person entitled to the lien, so that a person may have an equitable lien, though he has parted with possession. But all these developments in this branch of the law belong to a later period in its history.

The Relation of the Law of Ownership and Possession to other Branches of the Common Law

The influence of this body of common law principles as to ownership and possession is apparent in many different branches of the common law; and, since equity follows the law and starts from the basis of these legal rights, it is hardly less apparent in certain branches of equity. In fact its influence can be traced in all branches of the law—criminal, civil, and mercantile.

We have seen that, in the criminal law, the common law theory of possession is, and always has been, the foundation of the law of larceny. It has governed its development; it still governs its leading principles; and it is responsible for many of those inadequacies which have rendered necessary the creation, both of statutory extensions of this crime, and of other cognate offences such as false pretences and embezzlement.[2]

In the civil part of the common law it governs the law as to torts to chattels, for the simple reason that it has, to a large extent, been shaped by the actions formed to remedy these torts—trespass, case, and more especially trover. As we have seen, it is partly due to the fact that the law as to the ownership and possession of chattels has been shaped by actions of this kind, and not by a hierarchy of real actions such as shaped the development

it was however ruled in Watbroke v. Griffith (1610) Moore. K.B. at p. 877 that he could not use a horse on which he had a lien; in Jones v. Pearle (1723) 1 Stra. 557 the right to sell was upheld for London only; cp. Thames Iron Works v. Patent Derrick Co. (1860) 1 J. and H. at pp. 97-98 *per* Page Wood, V.C.; innkeepers have now a statutory right to sell a horse to pay the expense of his keep, 41, 42 Victoria c. 38 § 1.

[1] Thames Iron Works v. Patent Derrick Co. (1860) 1 J. and H. 93; though in 1816 Lord Ellenborough seems to have favoured the right to sell, Hartley v. Hitchcock 1 Stark. 408.

[2] Vol. iii 361-366.

of the land law, that the power to create future interests in these chattels has at common law always been meagre.[1] Naturally the character of the law which has grown up round these actions has shaped the whole law of bailment; and we have seen that some very early ideas as to the powers and rights of possessors have been thus preserved, and still influence the legal position of bailors and bailees in relation both to one another, and to the world at large.[2] Equally naturally it has shaped the law as to gifts inter vivos.[3] In the law of contract its influence can be seen in the contract of sale of goods; and, though the development of that contract has caused one large exception to its fundamental principle that there can be no transfer without an actual delivery,[4] yet its influence has been felt in the growth of many of the detailed rules, which regulate such of its incidents as the nature of the acceptance and actual receipt required by the statute of the Frauds, the manner in which and the circumstances under which the property in or the possession of the goods sold will pass, and the rights of unpaid vendors. Then, too, we have seen that the whole doctrine of common law possessory liens originates in the permission given by the law to certain persons to retain their possession of chattels till their claims have been satisfied.[5] Equity was obliged to take account of this common law theory of ownership and possession when it was moulding the law as to the administration of assets; for it is on the legal rights of executors and administrators to the chattels of the deceased[6] that much of the equitable superstructure is based.

Naturally in mercantile law its influence has been felt in many directions. In some cases mercantile necessities have helped to develop its principles. Illustrations can be seen in the law as to possessory liens, and in many of the detailed rules of the contract of sale. But more often those necessities have produced modifications which have, in time, developed into important branches of mercantile law. In the interests of creditors these necessities have caused the growth of a law of bankruptcy;[7] and, for the proper working of that law, it has been necessary to make many rules as to the circumstances under which property is available for distribution among creditors, which are quite contrary to the ordinary principles of the law of property.[8] The fact that ownership could be secretly transferred by deed, without a transfer of possession, gave an opportunity for secret conveyances and mortgages of chattels, which might easily be used to defeat creditors; and partly

[1] Above 469-478. [2] Above 450-455. [3] Above 505-509.
[4] Vol. iii 354-357; above 505. [5] Above 511-513.
[6] Vol. iii 585-591; vol. vi 653-654. [7] Vol. viii 229-245.
[8] Ibid 239-240.

owing to this fact, partly in the interests of the borrowers themselves, much legislation as to bills of sale has been required.[1] We have seen, too, that, in the case of factors and other possessors who are not owners, mercantile necessities have caused changes in the law, which have restored to possessors powers which they once had in the very earliest period of the law.[2]

But perhaps the largest modification, which mercantile necessities have made in these principles of the common law, is their contribution to the modification of the common law treatment of choses in action. We shall see that many causes combined to produce the common law doctrines upon this matter;[3] but one was the incapacity of the early common law to allow that a person out of possession had anything of which he could dispose.[4] The growth of a law of contract in the sixteenth and seventeenth centuries helped to undermine this idea, just as, in an earlier period, the development of the actions of debt and detinue, which enforced the rights of the parties to a contract of sale, created the most important exception to the rule that ownership cannot be transferred without delivery. But most was done by the incorporation into the common law of that law of negotiable instruments which had been developed in continental commercial law.[5] We shall see that in this branch of the law, just as in that branch of the law which modified the common law rules of ownership by giving extended powers to possessors, certain earlier principles, which had allowed a sort of assignment of mere rights, were in substance revived.[6] But of these developments which have created a law of negotiable instruments, and a complex body of doctrine as to choses in action, I cannot speak till the development of the common law rules as to choses in action, and the development of the law of contract have been considered. These two matters will form the subject of the next section and the next chapter.

§ 3. Choses in Action

"All personal things are either in possession or action. The law knows no *tertium quid* between the two."[7] It follows from this that the category of choses in action is in English law enormously wide, and that it can only be defined in very general terms. This is clear from the terms of the definition given by Channell, J., in *Torkington v. Magee*,[8] which is generally accepted as correct.

[1] Pollock and Wright, Possession 79.
[2] Above 510.
[3] Below 518 seqq.
[4] Vol. iii 92, 353; above4 55-456.
[5] Vol. viii 146 seqq.
[6] Ibid 115-119, 145 and n. 1.
[7] Colonial Bank v. Whinney (1885) 30 C.D. at p. 285 *per* Fry, L.J., whose dissenting judgment was upheld by the House of Lords 11 A.C. 426.
[8] [1902] 2 K.B. at p. 430.

It runs as follows: "'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." In fact the list of choses in action known to English law includes a large number of things, which differ widely from one another in their essential characteristics.[1] In its primary sense the term chose in action includes all rights which are enforceable by action—rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach; rights arising by reason of the commission of tort or other wrong; and rights to recover the ownership or possession of property real or personal. It was extended to cover the documents, such as bonds, which evidenced or proved the existence of such rights of action. This led to the inclusion in this class of things of such instruments as bills, notes, cheques, shares in companies, stock in the public funds, bills of lading, and policies of insurance. But many of these documents were in effect documents of title to what was in substance an incorporeal right of property. Hence it was not difficult to include in this category things which were even more obviously property of an incorporeal type, such as patent rights and copyrights. Further accessions to this long list were made by the peculiar division of English law into common law and equity. Uses, trusts, and other equitable interests in property, though regarded by equity as conferring proprietary rights analogous to the rights recognized by law in hereditaments or in chattels, were regarded by the common law as being merely choses in action. The first question, therefore, which must be answered by anyone who is writing a history of choses in action, is the question how English law came to include this great mass of miscellaneous rights under one head.

It is clear that the diversity of the things included under the category of choses in action, must lead to a diversity in the legal incidents of various classes of choses in action. In fact their legal incidents do differ very widely; for, being different in themselves, they have necessarily been treated differently both by the courts and by the Legislature. It is impossible to treat fully of the law of choses in action in general; and the various classes of choses in action are usually treated, not under this one general category, but under the separate branches of law to which they more properly belong. If we want to know the law, for instance, as to bills and

[1] For an exhaustive list see Halsbury, Laws of England iv 362-365; and for a discussion of the meaning of the term, and an account of the salient features of some of these varieties of choses in action see the following articles in the L.Q.R.: H. W. Elphinstone, What is a Chose in Action? ix 311; T. C. Williams, Is a right of action in tort a Chose in Action? x 143; Charles Sweet, Choses in Action x 303; Spencer Brodhurst, Is copyright a Chose in Action? xi 64; T. C. Williams, Property, Things in action, and Copyright xi 223; Charles Sweet, Choses in Action xi 238.

notes, or shares, or copyright, or patents, we should not think of looking for it in a treatise on choses in action, but rather in books on mercantile law, company law, or in special treatises devoted to these particular things. Nevertheless the fact that all these things are classed as choses in action, has had some influence on the shaping of their legal incidents. The original meaning of a chose in action—a right to be asserted by an action—has never been wholly lost sight of; and it has had some influence even upon those classes of choses in action which differ most widely from the original type. In spite of all differences they are choses in action; and, when questions have arisen, which have not been specially provided for by the Legislature or otherwise, it has been necessary, in order to solve them, to have recourse to the original conception of a chose in action.[1] Here, as in other branches of the law, it has been necessary to seek authority on new problems from old cases, which were decided at a time when the law knew only the original type of choses in action. Hence the fact that all these things are classed as choses in action has left its mark upon the law; and, partly from this cause, partly by reason of the divergencies between the different classes of choses in action created from time to time by the courts and the Legislature, the law upon many points connected with this subject was, and still is to some extent, confused, inconvenient, and uncertain. If, therefore, we would understand the history of the law upon this topic, we must consider the legal incidents of the original type of choses in action, and the modifications of those incidents made from time to time, both in the original and the later types.

Therefore I shall deal, firstly, with the growth of the different varieties of choses in action; and, secondly, with the legal incidents of these different varieties.

The Growth of the Different Varieties of Choses in Action

In dealing with this subject it will be necessary to say something of the meaning which came to be attached to the phrase chose in action in the mediæval common law. We shall see that during that period two tendencies are observable. In the first place, the term chose in action gradually becomes a technical term, and, in the second place, its meaning tends to expand. When these mediæval developments have been dealt with, we shall be in a position to trace the history of the still greater expansion of its meaning which took place in the course of the sixteenth, seventeenth, and eighteenth centuries, firstly and mainly under the

[1] A very good illustration is afforded by the case of the Colonial Bank v. Whinney (1885) 30 C.D. 261, 11 A.C. 426.

exigencies of the growth of commercial law, and secondly by reason of the growth of a separate and definite system of equity.

(1) The mediæval developments.

Bracton classes "actiones" amongst incorporeal things.[1] These "actiones," he tells us, are distinguishable from other incorporeal things, such as rents or advowsons, in that they are not recognized as completely the property of a deceased person. He cannot leave them by his will till they have been put in suit and judgment got upon them.[2] In fact, these "actiones" differ widely from the other incorporeal things known to the mediæval common law; for, as we have seen, these incorporeal things were regarded as property and assimilated to corporeal things.[3] We have seen, too, that the "realism" of the mediæval common law made for the multiplication of these incorporeal things, and classed under this head such things as annuities and corrodies, which in our modern law would be created by contract, and would therefore be classed as choses in action.[4] But mere rights of action were not touched by this realism. An action necessarily involves a definite plaintiff and a definite defendant. The right of action therefore is an essentially personal right of one person against another; and it is for this reason that they could not, as Bracton explained, be left by will. This conception of a right of action is reproduced by Fleta,[5] who classes an "actio" with such inalienable things as res sacra, res coronæ, and a liber homo;[6] and it became a recognized principle of the common law. Thus in Edward III.'s reign it is said that, though the lord of a villein may take an incorporeal thing like a rent, which has been granted to the villein, and of which the villein is seized, "that which remains in action to the villein, as for instance the right under an obligation made to him or under a covenant or warranty, the lord cannot take."[7] Thus it would

[1] "Incorporales vero res sunt, quæ tangi non possunt, qualia sunt ea, quæ in jure consistunt sicut hæreditas, usus fructus, advocationes ecclesiarum, obligationes, et actiones, et hujusmodi," f. 10b.

[2] "Item quæro, an testator legare possit actiones suas? Et verum est, quod non de debitis, quæ in vita testatoris convicta non fuerunt nec recognita, sed hujusmodi actiones competunt hæredibus. Cum autem convicta sint et recognita, tunc sunt quasi in bonis testatoris, et competunt executoribus in foro ecclesiastico" ff. 61a, 61b; to the same effect f. 407b, where two cases are cited; Fleta repeats the same rule ii 57. 13, 14.

[3] Vol. ii 355-356; vol. iii 97-101.

[4] Vol. ii 355; vol. iii 152-153.

[5] Above n. 2.

[6] "Actio autem, res sacra, res coronæ, liber homo, jurisdictio, pax, muri et portæ civitatis, a nullo dari debent, ut valida sit donatio," iii 6. 2.

[7] "Item dit fuit, que ceo que est en possession de villein come rent grante al villein de que il est seisi, le Seignior le puit happer, mes ceo que demurt en accion al villein le Seignior n'avera pas. Come si obligation de dette soit fait al villein, ou covenant ou garrantie fait au villein, de ceo le Seignior n'avera nul avantage," 22 Ass. pl. 37 = Bro. Ab. *Chose in Action*, pl. 8.

seem that in its earliest sense the term chose in action meant as Williams has said,[1] "a thing in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action."

It is obvious that the number and variety of these rights, and the manner in which they are developed by the law, must to a large extent depend on the law of procedure. The law of actions determines necessarily the conditions under which a right is asserted by action. Now we have seen that in the mediæval common law the division of actions into real and personal was fundamental. It is to be expected, therefore, that rights which fell within the sphere of the one class of actions, would be treated somewhat differently from rights which fell within the other class. This is to some extent the case. In fact, it is probable that originally the term chose in action was applied to a right to bring a personal action. We have seen that Bracton, following Azo, had laid it down that actions spring chiefly from obligations.[2] He thus associated the term "action" mainly with personal actions. Apparently this idea took root; for we can see from the case just cited from the Book of Assizes,[3] and from other cases in later Year Books,[4] that the phrase "chose in action" is used mainly in connection with rights arising under some one of the personal actions such as debt, detinue, or trespass. It is not much before the sixteenth century that it is extended to cover rights arising under the real actions. It is then sometimes called a chose in action real, a phrase which points to the fact that chose in action was regarded as primarily connected with the personal actions.[5] Even then its connection with the personal actions lived on in the definition given by the Termes de la Ley,[6] and in Blount's Law Dictionary;[7]

[1] Personal Property (17th ed.) 29. [2] Vol. ii 274-275.

[3] Above 518 n. 7.

[4] See e.g. Y.BB. 9 Hy. VI. Hil. pl. 7; 19 Hy. VI. Mich. pl. 100; 39 Hy. VI. Mich. pl. 36; 5 Ed. IV. Mich. pl. 22—a right of action for ravishment of ward, which was in the nature of trespass, vol. iii 17 n. 1, 63-64.

[5] Thus Brooke Ab. *Chose in Action* pl. 14, abridging a case of 33 Hy. VIII., reports a case in which it was said that, "Si Abbe fuit disseisi de 4 acres de terre, le roy ne poct ceo graunt ouster devant entree fait per luy en ceo, pur ceo que est chose in accion reall, et nyent semble al chose in accion personall ou mixt come dett garde et hujusmodi"; note that in Y.B. 2 Hy. VII. Mich. pl. 25 a grant by the crown of a right of re-entry and of a "chose qui gist en accion" are spoken of as if they were separate things, though it would seem that the mention of a right of entry has suggested to Huse, C.J., the idea of a chose in action—their similarity is beginning to be perceived.

[6] "Things in action is when a man hath cause or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity, or rent, action of covenant or ward, trespasse of goods taken away, beating or such like," cited L.Q.R. ix 311.

[7] "Chose in action is a thing incorporeal, and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong, are to be accounted choses in action," cited ibid 311-312.

and signs of the old idea appear even in Blackstone.[1] Long before Blackstone's time, however, it was quite clear that it applied to rights to be asserted by real as well as by personal actions.[2] The result of this development was to merge certain ideas which had their roots in the treatment of rights arising from these two classes of actions, and so to give rise to that common law conception of a chose in action, which was so largely extended in later law. We must therefore examine the nature of the rights which arose within the spheres of the real and personal actions respectively, and the manner in which these rights came to be merged in the general conception of a chose in action.

Since the conception of a chose in action was primarily connected with a right arising from a personal action, I shall, in the first place, say something of the manner in which rights of this kind were regarded, and of the contribution made by ideas derived from this source. In the second place, I shall say something of the contribution made by ideas derived from rights arising within the sphere of the real actions. In the third place, I shall indicate the results of the combination of these two sets of ideas.

(i) *The rights arising from the personal actions.*

In the language of Roman law, personal actions were founded upon an obligatio ; and an obligatio might arise either out of contract or tort. Britton, though he discarded much of Bracton's Roman law, repeats this dictum ;[3] and though, as we have seen, many of the personal actions of English law cannot be clearly grouped under these categories,[4] the distinction was remembered, and necessarily emerged as the idea of contract came into greater prominence with the growth of the action of assumpsit. But it is clear that a personal action, brought either on a contract or a tort, is an essentially personal thing. The two parties have agreed, or the plaintiff has been wronged by the defendant. In both cases the cause of action arises from matters affecting these two persons and these only. On that account the common lawyers saw as clearly as the Roman lawyers that such rights of action were personal matters between these two persons. Therefore the assignment of such a right of action by the act of the two parties was unthinkable.[5] Indeed, it was with difficulty, and only gradually and

[1] Comm. ii 396-397.

[2] Above 519 n. 5 ; see the definitions given in Shepherd's Touchstone, and Jacob's Law Dictionary, cited below 527 nn. 5 and 6.

[3] I. 29. 2. [4] Vol. ii 369 ; vol. vi 637-639.

[5] This was first suggested by Spence, Equitable Jurisdiction ii 850, who pointed out that this was the foundation of the doctrine adopted in every other state in Europe ; and that this is the correct view has been proved by Sir F. Pollock, Contracts (9th ed.) 232 and App. Note F. ; up to that time lawyers had been content to accept the view put forward by Coke in Lampet's Case (1613) 10 Co. Rep. at f. 48a that the reason for

partially, that it was allowed to pass by operation of law to the representatives of a deceased person.[1] On the other hand, to allow the person entitled to bring the action to release his right to the person against whom it could be brought, involved no logical impossibility; for a personal right can as easily be dissolved as created by the act of the two persons concerned. Therefore, just as a personal right, such as a debt, can be created by the agreement of the parties, so the debt and the right of action for it, can be released by the converse agreement.[2]

But, as the common law developed, it soon became apparent that certain actions in tort were in substance actions to recover property; and we have seen that, by means of developments both in the actions of detinue and of trespass, the proprietary rights of the owner out of possession were coming to be better protected.[3] Thus it was recognized in the sixteenth century that a bailor, who had bailed his property for a term, had "the property in reversion."[4] It was also recognized that an owner of goods might retake them from a trespasser,[5] and that a release by the owner of his rights of action to the wrongdoer would not bar his right of entry.[6] We might therefore have expected that the rights of the owner out of possession would come to be recognized as something more than a mere personal chose in action; and that they would develop into assignable rights of property. And, in fact, there are some hints that the law was tending to develop in this direction. Thus in 1431[7] Paston, J., said, "if I bail to you a deed to rebail to me, and then I grant the same deed to B, I shall not have writ of detinue against you after this grant, but the said B will have writ of detinue."[8] So too in 1491 the validity of a gift by a bailor seems to be maintained by Vavisor;[9] but it was

the rule was the discouragement of maintenance; we shall see that the desire to discourage maintenance and kindred offences has had a very important influence on the law as to the assignability of choses in action, below 524-527; but, though it was a contributory cause to the continuance of their non-assignability, and to other points connected with the law relating to them, it cannot be regarded as being the sole or the earliest cause.

[1] Vol. iii 578-579, 584.

[2] Litt. §§ 508, 511, 512; in commenting on § 512, which deals with the release of a debt before the time of payment has arrived, Coke says, Co. Litt. 292b, "For that the debt is a thing consisting merely in action, and therefore, albeit no action lieth for the debt, because it is *debitum in praesenti quamvis sit solvendum in futuro;* yet because the right of action is in him, the release of all actions is a discharge of the debt itself."

[3] Vol. iii 324-328, 348-350; above 402 seqq.

[4] Brooke, Ab. *Propertie et Proprietate Probanda*, pl. 33 = Y.B. 22 Ed. IV. Pasch. pl. 29, in which the question was discussed whether cattle let by a lessor for a term could be taken for his debt.

[5] Vol. iii 279-280; Chapman v. Thumblethorp (1594) Cro. Eliza. 329.

[6] Litt. § 498.

[7] Y.B. 9 Hy. VI. Hil. pl. 17.

[8] "Si jeo baille a vous un fait a moy rebailler, et puis jeo grant meme le fait a B., jeo n'aurai bref de detinue vers vous apres cel grant, mes le dit B aura bref de detinue."

[9] Y.B. 6 Hy. VII. Mich. pl. 4 (pp. 8-9).

distinctly denied by Brian, C.J., who held that such rights could not be given.[1] But Brian's view did not wholly prevail. The later cases show that modifications were being made. In 1561 it was held that, where a woman had bailed property to another and married, her husband could release the right to the property to the bailee.[2] This shows that the bailor's proprietary right was regarded as something more than a mere chose in action. It was sufficiently proprietary in its character to pass to the husband on marriage. Similarly, we have seen that it was the fact that a contract of sale gave right to get possession, which could be asserted by action of detinue, which is the origin of the rule that a sale passes the property in the goods without delivery.[3] In the case of a sale, therefore, it was recognized that a right to the property sold, which could be thus asserted, was much more than an unassignable chose in action. In *Sir Thomas Palmer's Case*[4] it was held that the grantee of six hundred cords of wood, to be taken by the assignment of the grantor, had an assignable interest in the wood.[5] The ownership of the wood had passed to the grantee, and this ownership—this right to possession—was regarded not as a mere right of action to get possession, but as assignable property.

It would seem, therefore, that there was a tendency to think that rights to chattels, though they could only be asserted by a personal action, were something more than mere unassignable choses in action. But this tendency did not develop; and, though the law has come to be settled in this way, it has not been so settled till quite modern times.[6] This was due mainly to two causes. Firstly, it was due to the peculiar development of the personal actions for the recovery of property. We have seen that detinue was superseded by the action on the case founded on a trover and a conversion; and that this was an action which sounded in tort.[7] It was originally not regarded as being of so proprietary nature as detinue. Therefore such a right of action was necessarily purely personal, and, consequently, a mere chose in action. Thus it was held in 1664, in the case of *Powes v. Marshall*,[8] by Twisden and Windham, JJ.,[9] that, though a husband could alone bring the proprietary action of detinue for

[1] "S'il n'ad forsque droit cel don est void; car on ne poit don son droit," Y.B. 6 Hy. VII. Mich. pl. 4 p. 9.

[2] Dame Audley's Case, Moore 25.

[3] Vol. iii 354-357.

[4] (1601) 5 Co. Rep. 24b.

[5] "That Cornford had an interest which he might assign over, and not a thing in action or a possibility only," ibid.

[6] Above 455-456; below 533-534.

[7] Above 413-414.

[8] Sid. 172.

[9] "Est diversity inter actions queux affirme property come replevin detinue etc., car ceux doint estre port in le nosme del baron sole, quia le property est affirme, et actions queux disaffirme property, come trespass, trover etc., car ceux doint estre port in ambideux lour, nosmes, quia sont found sur le tort fait devant le coverture."

things which belonged to his wife before marriage, both must join if an action of trover was brought, because such an action was founded solely on the tort of converting the things. According to this view, the right which was asserted in such an action, though in substance a right of property, was, on account of the character of the action, regarded as a mere chose in action.[1] On the other hand, by this date the proprietary aspect of trover was beginning to develop. Hyde, C.J., and Kelynge, J., dissented from the view of Twisden and Windham, JJ., holding that the husband could sue alone; and in 1674, in the case of *Blackborne v. Greaves*,[2] it was held that such an action might be brought either by the husband alone, or by husband and wife together. It would seem, therefore, that the objection arising from the form of the action was got over, and that the rights of the owner out of possession were recognized as something more than a mere chose in action. But this development was delayed by the second of the two causes mentioned above. Secondly, another very powerful reason, which strengthened the tendency to adhere to the old view that the right of the owner out of possession is a mere chose in action, is to be found in a development which was taking place in the law as to the rights arising in the sphere of the real actions.

(ii) *The rights arising in the sphere of the real actions.*

The rights arising in the sphere of the real actions were rights to get seisin, which were enforceable either by entry or action. We have seen that the omission to pass any statutes of limitation in the Middle Ages enormously extended the time during which a disseised owner had a right of entry.[3] We have seen too that legislation extended the number of cases in which such an owner had a right of entry;[4] and that the result of these two causes was practically to limit the cases in which a disseised owner had only a right of action, to the cases when there had been a descent cast or a discontinuance.[5] This meant that the owner's right to get possession was better protected and more fully recognized, so that, as in the case of chattels, this right to get possession might easily have developed into something more than a mere chose in action. But all development in this direction was stopped by the extension which both the Legislature and the courts gave to the offences of maintenance and champerty.

It is clear that all legal systems which permit owners out of possession to assign their rights to recover property, and their

[1] This agrees with Lord Mansfield's reasoning in Hambly v. Trott (1776) 1 Cowp. 371, vol. iii 581; above 441-442.

[2] 2 Lev. 107, and the note at p. 108.

[3] Vol. ii 584; vol. iii 10.

[4] Vol. ii 585; above 32.

[5] Vol. ii 585-586.

rights under an obligatio, must recognize that this privilege may be abused. They must recognize that these rights may be assigned to persons who, by their power or influence, may be in a position to put a great, and perhaps an illegitimate, pressure on the possessor, or on the person who owes the duty; and that very dubious rights may be assigned to persons in such a position merely because they are dubious. When, in later Roman law, assignments of choses in action were permitted, it was found necessary to enact that the assignee should not be able to recover from the person liable more than he had paid to the assignor,[1] and to prohibit assignments to persons more powerful than the assignor;[2] and in 1912 Farwell, L.J., pointed out that a free permission to assign rights of action in tort might lead to blackmailing.[3] The risk, then, of maintenance is a risk which all legal systems must face if they permit the assignment of choses in action.

In England, in the later mediæval period, the disorderly state of the country, the technicality of the common law procedure, the expense of legal proceedings, and the ease with which jurors, sheriffs, and other ministers of justice, could be corrupted or intimidated, made maintenance and kindred offences so crying an evil, that it was necessary to prohibit sternly anything which could in the smallest degree foster them.[4] Therefore the courts in the Middle Ages stretched the offence of maintenance to its utmost limits; and statutes repeatedly prohibited all practices which could favour it. Thus it happened that all trafficking in rights of entry upon land were sternly forbidden; and we have seen that, as late as 1540,[5] a statute was passed which sharpened the edge of the mediæval legislation. On the other hand, a permission to release a right of entry to the tenant in possession tends to stop litigation, and therefore to discourage maintenance. Such a release was therefore permitted. But so serious and so dangerous was the offence of maintenance all through the Middle Ages, and until the Tudors had created a strong and efficient government, so

[1] Code 4. 35. 22.

[2] Code 2. 13. 2; these enactments are cited by Moyle, Justinian (5th ed.) 484; at p. 482 Dr. Moyle says that, while the English lawyers based their opposition to the assignment of choses in action on the evils of maintenance, the Romans based it on the personal character of the relations created by an obligatio; we have seen that this is not wholly true, above 520; but it is true that, owing to the disorderly state of the country in the fifteenth and early sixteenth centuries, the evils of maintenance were more acutely felt, and the need for suppressing it bulked larger than in Roman law.

[3] "I think it would be exceedingly bad policy to allow a person to sell rights of action for tort which he did not care to run the risk of enforcing himself; as for example to allow a liquidator to put such rights up for auction, and sell them to someone who might buy for a small sum of money the chance of recovering a larger sum, or possibly of blackmailing," Defries v. Milne (1913) 1 Ch. at pp. 110-111.

[4] Vol. i 334-335; vol. ii 416, 457-459; vol. iii 394-400; vol. iv 520-521; vol. v 201-203.

[5] 32 Henry VIII. c. 9; vol. iv 521; above 50-51.

great was the risk that any permission to assign rights of entry would lead to acts of maintenance, that it came to be thought that rights of entry upon land were not assignable, because of the risk of encouraging this offence.[1]

In the case of rights of action, indeed, it was recognized that they were unassignable because, though rights to recover property, they were rights of *action*, and therefore essentially personal. For it was thought that, as a right to bring a real action must be a right to sue a particular person in possession of the freehold, it was essentially a personal right, consisting only, as Coke said, "in privity."[2] Any chance that the law would recognize that a disseised owner's right to recover his ownership was merely incidental to that ownership, and that he would, therefore, be permitted to assign his right of ownership and with it, his right of action to recover it, was stopped by the fact that such a permission would obviously encourage maintenance. On the other hand, a release of a right of action to the tenant in possession was allowed for exactly the same reason as a release of a right of entry.[3]

Thus it happened that these rights arising in the sphere of the real actions, exactly resembled the rights arising from the personal actions, in that they could be released, but could not be assigned. No doubt both their capacity of being released, and their incapability of being assigned, were partly due to their personal character; but their incapability of assignment was due also and chiefly, in the case of many of these actions, to the dread of encouraging maintenance. The dread of encouraging maintenance bulked so large, that the fact that their incapability of assignment was due to the personal character of many of these actions, was overlooked; and thus it came to be thought that all rights of action were unassignable for this cause—a point of view which made for the permanence and rigidity of the rule. Indeed, as we shall now see, this dread of maintenance, which arose from the state of law and society in the Middle Ages, has had both a permanent and an unfortunate influence on this branch of the law.

[1] "And first was observed the great wisdom and policy of the sages and founders of our law who have provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice. . . . But all rights, titles and actions may by the wisdom and policy of the law be released to the terre-tenant, for the same reason of his repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty," Lampet's Case (1613) 10 Co. Rep. at f. 48a.

[2] "Such a right, for which the party had no remedy but by action only to recover the land, is a thing which consists only in privity, and which cannot escheat, nor be forfeited by the common law. . . . And it was observed by the justices, that by no Act of Attainder that ever hath been made, actions were given, but rights of entries etc.," Winchester's Case (1583) 3 Co. Rep. at f. 2b.

[3] Lampet's Case (1613) 10 Co. Rep. at f. 48a, cited above n. 1.

(iii) *The results of the combination of the ideas derived from the treatment of rights of action personal and real.*

Of the effect of the dread of encouraging maintenance upon the power to assign choses in action I shall speak in my next section, when I am dealing with the legal incidents of choses in action.[1] Here I wish to point out another of its effects—its contribution to the making of the common law conception of a chose in action. It seems to me that it was the influence of this idea, which led to the extension of the conception of a chose in action, to cover rights to bring not only personal but real actions; and therefore to include in this conception, not only rights which depended on a contractual or delictual obligation, but also rights which depended upon a claim to the ownership of property. The manner in which this influence was exercised was, it seems to me, somewhat as follows: It is quite obvious that a right of action which is based on a contractual or delictual obligation is entirely personal in its character, and that, on that account its release can, but its assignment cannot, logically be allowed. But this is not by any means so obvious where an owner, out of possession, is claiming from a possessor a thing in his possession, by virtue of his right as owner to get possession. There is, as we have seen, no logical reason why such ownership, and with the ownership, the right of action, should not be assigned; and in fact, there are some signs that the lawyers of the fifteenth and sixteenth century might, on this ground, have allowed a modified right to assign the ownership of chattels personal, and with the ownership, the rights of action.[2] But the dread of encouraging maintenance had led to the permission to release, and to the refusal to permit any assignment of rights of entry and action to land. Thus it happened that rights of action, whether real or personal, had these two important features in common—both could be released, and neither could be assigned. Naturally lawyers did not stop to analyse the reasons why they could be released and could not be assigned. They looked merely at these two resemblances, and more especially at the fact that both were unassignable; and, as the reason for the non-assignability of rights of entry upon and action for land was only too obvious, they naturally adopted the idea that this reason was applicable to all these rights of action.[3] When this had happened, it was inevitable that

[1] Below 533-537. [2] Above 521-522.

[3] Mr. Sweet has pointed out, L.Q.R. x 308, 309-310, that "the fulminations against maintenance and champerty, which abound in the old books, were directed not so much against the maintenance of actions of debt and the like, as against abuses arising from the practice of buying up rights of entry and rights of action for the recovery of land"; and that "one kind of maintenance was distinguished by the old writers as 'maintenance in the country,' *Manutentio ruralis*, being confined to claims in respect of land, and the very name of champerty shows that the offence had a similar origin"; but the same idea was applied to chattels, certainly as early as

all these rights of action should be grouped together under the comprehensive title of choses in action.

Thus we arrive at the common law conception of a chose in action. We have seen that in 1486 the similarity of a right of entry to a "chose qui gist en accion" was beginning to be perceived, and that rights of entry or rights to bring a real action were called choses in action real in 1542.[1] The fact that all these choses in action were treated by the law in a similar manner, coupled with the disuse of the real actions,[2] soon obliterated the distinction between real and personal choses in action; and so the common law widened its conception of a chose in action, and came to include in it all rights of action, whether enforceable by real or by personal actions. According to the definition given by the Termes de la Ley, it includes more than rights to bring personal actions;[3] and, though the older idea which connected it with the personal actions lived on,[4] it is clear both from Shepherd's Touchstone[5] and Jacob's Law Dictionary,[6] that it included rights to be asserted both by real and personal actions. Thus all memory that there had ever been a distinction between the rights enforceable in the spheres of the real and personal actions, and the possibilities involved in it, disappeared.

(2) The later developments.

It was this mediæval development of the conception of a chose in action, which paved the way for further extensions in later law. Already at the close of the Middle Ages we can see that the way is being prepared for these extensions. In fact, in the late fifteenth and in the sixteenth centuries, we can detect three distinct lines, upon one or other of which the extensions made in later law will proceed by way of analogy, sometimes more and sometimes less close.

(i) During the sixteenth century the conception of a chose in action was extended from a right to bring an action, to the documents which were the necessary evidence of such a right. Thus in 1535 a bond was said to be a chose in action;[7] and in 1584, in

1431, Y.B. 9 Hy. VI. Hil. pl. 17; and see Pollock, Contracts (9th ed.) App. 753 for a clear account of this case.

[1] Above 519 n. 5.
[2] Above 9.
[3] Above 519 n. 6.
[4] Above 519 n. 7, 520.

[5] "Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entry to any real or personal thing," at p. 231, cited L.Q.R. x 307.

[6] "Generally all causes of suit for any debt duty or wrong are to be accounted choses in action. . . . A person disseises me of land, or takes away my goods; my right or title of entry into the lands, or action and suit for it, and so for the goods, is a *chose in action*: So a debt on an obligation, and power and right of action to sue for the same," sub. voc. *Chose* (3rd ed. 1736).

[7] Dyer at f. 5b.

Cayle's Case,[1] it was said that charters and evidences concerning freehold or inheritance, obligations, and other deeds and specialties, all came under this head. When the law had reached this point, it was inevitable that the many new documents, which the growth of the commercial jurisdiction of the common law courts was bringing to the notice of the common lawyers, should be classed in this category. Thus, during the seventeenth, eighteenth, and nineteenth centuries, such documents as negotiable instruments,[2] stock,[3] shares,[3] policies of insurance,[4] and bills of lading,[5] were declared to be choses in action; and this classification was sometimes recognized by the Legislature when it provided that, though choses in action, their legal incidents should be in some respects varied.[6]

(ii) We have seen that the large class of incorporeal things, which were recognized by the mediæval common law, was treated as far as possible like corporeal hereditaments.[7] They were therefore taken out of the category of choses in action. But we have seen that certain of these incorporeal things, such as annuities and corrodies, had always approximated to personal obligations to pay or perform.[8] It is not surprising, therefore, that when, in the fifteenth century, the conception of a chose in action was being extended to cover all sorts of rights which could be asserted by action, some should have thought that annuities should be included in this category. In 1482 Brian, C.J., said that an annuity was merely a "chose personal," which could not be granted;[9] and, if this opinion had prevailed, there can be little doubt but that it would have been classed under the growing number of choses in action. But this view did not prevail. In the same case Catesby pointed out that an annuity was recoverable, not by writ of debt but by a writ of annuity, and that, if granted to a man and his

[1] "The said words . . . do not of their proper nature extend to charters or evidences concerning freehold or inheritance, or obligations, or other deeds or specialties, being things in action," 8 Co. Rep. at f. 33a.

[2] Master v. Miller (1791) 4 T.R. at p. 344 *per* Grose, J.

[3] L.Q.R. x 311-312. [4] Re Moore, ex pte. Ibbetson (1878) 8 C.D. 519.

[5] Caldwell v. Ball (1786) 1 T.R. at p. 216.

[6] 4 William and Mary c. 3; 9, 10 William III. c. 44—stock in the funds, cited L.Q.R. x 312; for the stock and shares of other companies see below 542-543.

[7] Vol. ii 355-356; vol. iii 97-101. [8] Ibid 151-153.

[9] "Cest annuity ne puit estre grant, car c'est n'est que chose personel, . . . et ou annuity est grant en fee, si rien soit discend a heir le grantor, l'issue ne serra charge, nient plus que serra per obligation fait per son pere; et ou est dit qu'il est enheritance et discende, et l'heir avera accion de ceo, jeo grant bien, mes quel accion est ceo? certes nul accion mes bref d'annuity, que n'est que personel, car accion ancestral jamais il n'avera, ou si le pier fuit disseisi de ceo, il n'avera bref d'entre sur disseisin, ne aura accion real, per que il est en nature de accion personal. est n'est semble a les cases de rent secke, car de ce home avera accion real. . . . Et a ce que est dit, qu'il ad enheritance en l'annuity, et per ce il puit grant, Sir, home avera fee simple, et uncore il ne poit grant ce, come si jeo grant a un et ses heirs d'estre mon kerver, il est office de trust que il ne grauntera ouster," Y.B. 21 Ed. IV. Hil. pl. 38 (p. 84).

heirs, it would descend to the grantee's heirs.[1] He argued therefore that, though the grantee had no tangible thing, but only a right, that right, whether enforceable by action or not, was, like the right to a rent, a thing which could be assigned;[2] and, though Brian, C.J.'s, view is taken by Perkins,[3] it is Catesby's view which has prevailed.[4] On the other hand, there was a tendency to regard any incorporeal thing which could not be assigned, as a chose in action. The influence of this incident of non-assignability was by no means exhausted when it had led to the inclusion under one category of rights arising within the sphere both of the real and personal actions. Thus an advowson was clearly an incorporeal hereditament. But in 1570 it was said that if the church was void, so that no grant of the next presentation of the church could be made, the right to present was merely a chose in action.[5] Coke however recognized that, though from the point of view of non-assignability it resembled a chose in action, it was "not merely a chose in action," because it had certain of the other qualities of tangible property.[6]

It is clear, however, that there was a tendency in the sixteenth century to regard any intangible right, which was not clearly an incorporeal hereditament, and any non-assignable right, even though it was only temporarily non-assignable, as a chose in action. It seems to me that it was due partly to this tendency that such incorporeal property as patents and copyrights, came,

[1] "Et a ce que est dit que le bref (of annuity) est en nature de det, pur ce que le bref est en le *debet*, ils ne sont semblables, car en annuity home nemy puit aver son ley, mes en det auterment, et les executors averont l'accion de det sur obligation, et nemy le heir, car tiel action de det ne puit descender, mes l'annuity puit discender, et l'heir avera bref d'annuity, quel prove qu'el n'est personnel, ne semblable a action de det," Y.B. 21 Ed. IV. Hil. pl. 38 (p. 84).

[2] "Nient obstante que le grantee n'ad remedy per action, uncore ce ne prove mesque le grant est bon; come si jeo grant le rent de mon tenant, reservant a moy les autres services, le tenant attorne, ore cest rent passa, et uncore avant le possession, si le grant soit deny, il n'ad ascun remedy, et uncore le grant est bon. Mesme le ley est ou il fuit rent secke devant, issint icy, c'est annuity est real, et coment que il avera [? n'avera] action, uncore le grant est bon. Et Sir moy semble qu'il avera bref d'annuity," ibid.

[3] Profitable Book § 101.

[4] Baker v. Brook (1550) Dyer 65a; Gerrard v. Boden (1628) Hetley 80; cp. Maund's Case (1601) 7 Co. Rep. 28b.

[5] "By Harper Weston and Dyer holden, that the grant of the present avoidance is void, because it is a mere personal thing annexed to the person of him who was patron in expectancy at the time of the vacancy; and also a thing in right power and authority, and also a *chose in action*, and in effect the fruit and execution of the advowson, and not any advowson," Stephens v. Watt, Dyer at f. 283a.

[6] "*Note*, if the church becometh void, albeit the present avoidance be not by law grantable over, yet may the lord of the villein present in his own name, and thereby gain the inheritance of the advowson to him and his heirs: for albeit it be not grantable over, yet it is not merely a chose in action; for if a feme covert be seised of an advowson, and the church becometh void, and the wife dieth, the husband shall present to the advowson: but otherwise it is of a bond made to the wife, because that is merely in action," Co. Litt. 120a.

in the eighteenth century, to be classed as choses in action. Probably if these forms of property had arisen at an earlier stage in the history of the law, they would have been regarded as franchises, and therefore as incorporeal hereditaments; for it is obvious that, in the case of the patent, and of that species of copyright which depended upon royal grant, the analogy to the franchise is close;[1] and that, when copyright had come to depend upon statute, it was still a privilege which was more like a mediæval franchise than a chose in action. But, when these things had become recognized as objects of property, franchises were an obsolete and decadent class of property. The time had long passed when the law as to the classes of property protected by the real actions was the most highly developed branch of the law, when the easiest way to protect any right was to treat it as a thing, and to give it the protection of an action which was modelled on the pattern of the real actions.[2] The law of contract was in the ascendant; and, as the concept "chose in action" had been extended so as to include such documents of title to property as bills of lading and stocks and shares, it was natural that such property as patents and copyrights should be brought within it.[3] They were clearly not choses in possession, and they were analogous to other things classed as choses in action. Thus the way was prepared for the generalization that all personal property known to English law must consist either of choses in possession or choses in action.[4] But we shall see that, just as Coke in the sixteenth century was obliged to point out that certain of these choses in action were "not merely choses in action,"[5] so, in our modern law, the incidents of many of these things classed as choses in action show that they are in substance property of an incorporeal kind.[6] Their inclusion in the class of choses in action can only be explained by the history of the manner in which the concept "chose in action" has been gradually and continuously extended by analogy, until it has come to include so many heterogeneous rights that is a work of some difficulty to discover any resemblance between certain classes of them.

(iii) In the Middle Ages the interest of the cestui que use was at first analogous to a chose in action; for, as we have seen,[7] the

[1] For the origin and growth of patent rights see vol. iv 343-354; vol. vi 330-331; and for copyright see vol. vi 364 seqq.

[2] Vol. ii 355; vol. iii 454.

[3] For a discussion as to whether copyright is a chose in action see L.Q.R. xi 64, 223, 238.

[4] Above 515. [5] Above 529 n. 6. [6] Below 542-543.

[7] Vol. iv 432; though not called a chose in action by the older authorities, and even distinguished from a trust, which was said to be in the nature of a chose in action by Coke, below 531, its legal incidents, before it had been developed by the Chancery and regulated by the Legislature, justify Holmes's statement, Common Law 407, that it was in substance a chose in action.

trust was originally enforceable only against the feoffee to uses, and not against his heir or assignee. Cestui que use had, as Coke said, "neither jus in re nor jus ad rem, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpœna in Chancery."[1] But we have seen that the interest of the cestui que use had been so shaped, not only by the Chancery, but also by the Legislature, that his interest had become something very much more than a mere chose in action;[2] and this fact was recognized in the sixteenth century.[3] But in the sixteenth century the conception of a chose in action was beginning to expand. Therefore the common lawyers of that period had no hesitation in asserting that at common law an equitable trust consisted only "in privity," was unassignable on account of the risk of encouraging maintenance, and was therefore in the nature of a chose in action.[4] It is for this reason that many different kinds of equitable interests are classed as choses in action.[5] But inasmuch as the incidents of such interests are shaped by equity, the fact that they are at law classed as choses in action has had very little influence on their development.

Such then, was the manner in which the concept "chose in action" came to include so many diverse rights. We must now consider the evolution of the law as to the legal incidents of these various classes of rights.

The Legal Incidents of Choses in Action

The leading characteristics of choses in action were ascertained in the days when they were literally rights enforceable either by real or personal actions; and these characteristics were either logical deductions from the nature of such rights, or were ascertained by the need to settle the relation of these rights to other branches of the law. The main characteristic which follows from the nature of these rights in their non-assignability; and this has always been so prominent a characteristic of choses in action, that the lawyers were inclined to place any right permanently or temporarily unassignable in the category of choses in action. Indeed, as we have seen, it was largely due to this reason that all rights of this

[1] Co. Litt. 272b. [2] Vol. iv 432-433, 443-449. [3] See next note.

[4] "It was resolved by all the Justices, that admitting that Sir Thomas Heneage had a trust, yet could not he assign the same over to the plaintiff, because it was a matter in privity between them, and was in nature of a chose in action, for he had no power of the land, but only to seek a remedy by subpœna and not like to cestui que use, for thereof there should be *possessio fratris*, and he should be sworn on juries in respect of the use, and he had power over the land by the statute of 1 R. 3, and if a bare trust and confidence might be assigned over, great inconvenience might thereof follow by granting of the same to great men etc.," Coke, Fourth Instit. 85.

[5] Halsbury, Laws of England iv 364.

kind, whether arising within the sphere of the real or the personal actions, were classed together in the single category of choses in action.[1] Other characteristics of these rights were ascertained by the need to settle their relation to the king's rights to the chattels of persons outlawed or attainted, to the criminal law, to the husband's rights in his wife's property, to the law as to taking goods in execution, and to the law of bankruptcy. I shall therefore, in the first place, say something of the history of the manner in which the legal incidents of the original class of choses in action were ascertained by the application of the rules relating to assignment, and by the need to settle their relation to these other branches of the law. In the second place, I shall give some illustrations of the manner in which the legal incidents of this original class of choses in action were modified, when they were applied to the other varieties which subsequently emerged.

(1) The legal incidents of the original class of choses in action.

Assignability.

We have seen that the non-assignability of those choses in action, which arose from either a contractual or delictual obligation, was a necessary and a logical deduction from the nature of such a cause of action.[2] They were essentially personal rights—personal to the parties bound by the obligation. We have seen, too, that though this reasoning does not apply so forcibly to actions in which an owner out of possession is claiming to recover his property from another, the same result was produced by the application of the law of maintenance.[3] No assignment of rights of entry or action to land was allowed till 1845,[4] because to permit such assignment would tend to encourage maintenance. Naturally the principle of the statutes, which had prohibited these assignments in the case of land, was extended to actions to recover chattels. In fact, so prominent a place did this reason for prohibiting the assignment of choses in action take in English law, that it came to be regarded as the only reason for the non-assignability of choses in action.

This then was the principle from which the common law started. The main interest of its later history consists in the manner in which it has been gradually and partially modified. In relating this history it will be necessary to deal separately with (i) rights of action of a proprietary character; (ii) rights of action for breach of contract; and, (iii) rights of action of a purely delictual kind.

[1] Above 526-527.
[2] Above 520.
[3] Above 522-525.
[4] 8, 9 Victoria c. 106

(i) Rights of action of a proprietary kind can be quickly disposed of. The rules of law, statutory and otherwise, which prevented any assignment of rights of entry upon or action for land,[1] were so definite that no gradual modification of them was possible; and it was not, as we have seen, till 1845 that the Legislature permitted their assignment. In the case of chattels, both the fact that the action of trover, in which such rights had generally come to be asserted, was of a delictual character, and the objection based on the fear of maintenance, prevented the development of any of those modifications of the strict rule, of which we can see some signs in the sixteenth century;[2] and we have seen, that no statute, like the statute of 1845 in the case of land,[3] has expressly enabled the owner out of possession to alienate.

But it is clear that, at the beginning of the eighteenth century, and during the nineteenth century, a tendency towards some modification of the strict rule was again beginning to appear. In 1705 Holt, C.J., seems to assume that a bailor could make a gift of his right to the goods, though the donee might not be able to sue the bailee in detinue, since, by such gift, the bailee's special property was not transferred.[4] But as late as 1844, in the case of *Franklin v. Neate*,[5] Parke, B., held that the pawnor of a chattel had only an unassignable chose in action. This decision was however reversed, and it was held that the pawnor could, subject to the rights of the pawnee, sell his rights to a buyer; and that, if the buyer tendered to the pawnee the amount due, and the pawnee refused to deliver, the buyer could maintain trover. Similarly the right of the owner out of possession to alienate his property was assumed in the case of *Cohen v. Mitchell*,[6] and was recognized in the case of *Dawson v. the Great Northern and City Railway*.[7] And the courts have even gone further. They have

[1] Vol. iii 92; vol. iv 521; vol. v 202. [2] Above 521-522.

[3] 8, 9 Victoria c. 106 § 6; above 456.

[4] "If A bails goods to C, and after give his whole right in them to B, B cannot maintain detinue for them against C, because the *special property* that C acquires by the bailment, is not thereby transferred to B," Rich v. Aldred, 6 Mod. 216; Holt clearly supposes the gift is good: he does not say, as Brian, C.J., said (above 522 n. 1) that the gift is void.

[5] 13 M. and W. 481. [6] (1890) 25 Q.B.D. 262.

[7] "An assignment of a mere right of litigation is bad: Prosser v. Edmonds; but an assignment of property is valid, even although that property may be incapable of being recovered without litigation: see Dickinson v. Burrell," [1905] 1 K.B. at p. 271. Both the cases here cited were cases of equitable interests; in Prosser v. Edmonds (1835) 1 Y. and C. 499, A, being entitled to certain property under his father's will, assigned the whole (except a certain reversionary interest) to B, his father's executor; but A could have set aside the assignment on the ground of fraud. Afterwards A assigned all his interest under his father's will to C. It was held that C could not make use of A's rights to set aside the assignment to B on the ground of fraud, as such a chose in action was unassignable. In Dickinson v. Burrell (1866) L.R. 1 Eq. 337, A conveyed real estate to B, but the conveyance was liable to be set aside on equitable grounds. He then made a voluntary settlement of the same property. It was held

held in *Whiteley v. Hilt*[1] that a hirer, under a hire purchase agreement, may assign not only the possession of chattels hired, but also his rights under the agreement to acquire the ownership; and in *Glegg v. Bromley*[2] that, though a cause of action arising from tort is unassignable, the fruits of such an action, if and when recovered, are assignable; for, as Parker, J., pointed out in the latter case, the fruits of such an action are not an existing chose in action, "but future property identified by reference to an existing chose in action."[3] Thus, at the present day, the owner of chattels in the possession of another is as well able to assign his rights as the owner of land.

(ii) Rights of action of a contractual kind must always be of a purely personal nature. Therefore in early law the prohibition against their assignment was absolute.[4] It is true that in most cases they became transmissible on death at a comparatively early date.[5] It is true, also, that it was recognized that certain covenants might be so annexed to a particular estate in the land, that successive holders of that estate could enforce them.[6] But, to the end, the common law never in theory departed from its rule that rights of a contractual kind could not be assigned by an act of the parties to the contract.[7] As early, however, as the beginning of the fourteenth century the merchants had begun to circumvent this prohibition. If the right was to an ascertained sum of money, that is if it was a debt, the creditor could appoint the assignee his attorney to sue for the debt, and could stipulate that he should keep the amount realized; and, in the fifteenth century, this method of assigning a debt was recognized as valid by the common law courts.[8] Thus, as in Roman law,[9] the assignee sued for the debt in the assignor's name and as his attorney.

that the beneficiaries under the later settlement could set aside the conveyance to B, on the ground that this was a right incident to the property conveyed to them, and not, as in Prosser v. Edmonds, the conveyance of a mere right to litigate. It would seem to follow from the two cases already cited in the text, that if an owner out of possession conveyed his right to X, and the possessor wrongfully refused to hand it over to X, X could bring an action of conversion in the name of the owner, if not in his own name.

[1] [1918] 2 K.B. 808. [2] [1912] 3 K.B. 474. [3] Ibid at p. 489.
[4] Above 520. [5] Vol. iii 584-585.
[6] Ibid 157-166; above 287 seqq.

[7] Thus in 1867 Willes, J., said in the case of Gerard v. Lewis L.R. 2 C.P. at p. 309, "the rule against assigning a chose in action stood in the way of an actual transfer of the debt"; cp. Ames, Disseisin of Chattels, Essays A.A.L.H. iii 584.

[8] Y.B. 34 Hy. VI. Mich. pl. 15 *per* Wangford *arg.* and Prisot, C.J.; in Y.B. 15 Hy. VII. Hil. pl. 3 it is said that, "si on soit endette a moy et livre a moy un obligation en satisfaction de cest det, en que un auter est tenu a luy, jeo suirai action en le nom cesty que fuit endette a moy"; Brooke, Ab. *Chose in Action* pl. 3, in abridging this case, says, "Et sic vide que chose in accion poet estre assigne oustre pur loyal cause come just det, et nemy pur maintenance"; West, Symboleography § 521; cp. Ames, Essays A.A.L.H. iii 584 n. 2; Pollock, Contracts (9th ed.) App. 754.

[9] Moyle, Justinian (5th ed.) 482-483.

But, upon this device, the influence of the idea that the assignment of any chose in action was void because it tended to encourage maintenance, exercised a retarding influence. Cases in which this device was employed were often attacked on this ground.[1] But, the fact that the person maintaining had some sort of common interest with the person maintained of a legal or moral kind, was recognized as a good defence to an action for maintenance. Therefore, if the assignment of a debt, by way of the appointment of the assignee as the assignor's attorney, was attacked on this ground, it was necessary to show that the assignee and the assignor had some sort of common interest. It was held that a sufficient common interest existed, if it could be proved that the assignor owed money to the assignee, and that the assignment was made in satisfaction of the debt.[2] On the other hand, a common interest could not be proved, if it appeared that the assignee had merely purchased the debt from the assignor, without any particular reason for so doing.[3] It is true that in 1590, in the case of *Penson v. Hickbed*,[4] it seems to have been held that any assignment of a debt, coupled with a power of attorney to sue for it, was valid, unless it was void for champerty. But this case does not seem to have been followed. Right down to the latter part of the seventeenth century it seems to have been held, both by the common law courts and by the court of Chancery, that, unless the assignor owed money to the assignee and had made the assignment on this ground, the objection of maintenance was fatal. This principle was laid down in 1596[5] by the court of Common Pleas, and by Lord Keeper Bridgman (1667-1672) in the court of Chancery.[6]

When this point had been reached, it was inevitable that further developments should be made. At the beginning of the eighteenth

[1] Y.BB. 34 Hy. VI. Mich. pl. 15; 15 Hy. VII. Hil. pl. 3. [2] Ibid.

[3] Y.B. 37 Hy. VI. Hil. pl. 3—a case which shows that the common law courts and the court of Chancery took the same view on this question.

[4] Cro. Eliza. 170—to the objection that buying of bills of debt was maintenance, the judge said it was not, "for it is usual among merchants to make exchange of money for bills of debt, *et e contra*." And Gawdy said, "it is not maintenance to assign a debt with a letter of attorney to sue for it, except it be assigned to be recovered, and the party to have part of it"; in the report of the same case in 4 Leo. 90, the objection was taken that, though an assignment in satisfaction of a debt due to the assignee was good, this assignment was bad because it did not appear that any such debt was due; for these bills of debt see vol. viii 147-151.

[5] South and March's Case (1590) 3 Leo. 234—though it can be assigned to the queen, "it cannot be assigned to a subject, if not for a debt due by the assignor to the assignee, for otherwise it is maintenance"; Barrow v. Gray (1597) Cro. Eliza. 551; Ames, Essays A.A.L.H. iii, 584, and authorities there cited.

[6] "The Lord Keeper Bridgman will not protect the assignment of any chose in action unless in satisfaction of some debt due to the assignee; but not where the debt or chose in action is assigned to one to whom the assignee owes nothing precedent, so that the assignment is voluntary or for money then given," Freeman Ch. Cas. 145; it was probably decisions like these which caused Bridgman to get the reputation of sticking too closely to common law rules to be a good judge of the court of Chancery, vol. vi 538.

century, it was quite settled that equity would recognize the validity of the assignment both of debts and of other things recognized by the common law as choses in action.[1] In other words, it would, as the Judicature Act expresses it,[2] recognize the validity of the assignment of "any debt or other legal chose in action."[3] In equity, therefore, there was no need to show a special relationship between the assignor and the assignee, in order to rebut the presumption of maintenance. During the same century the common law courts, probably in consequence of the attitude of equity, soon adopted the same attitude with respect to the assignment of debts. The objection of maintenance was, it is true, a valid objection both at law and in equity if it could be proved;[4] but the courts now took the view that it was absurd to suppose that an assignment *per se* involved a presumption of maintenance.[5] Blackstone makes it quite clear that any such presumption was obsolete when he wrote.[6] And it should be noted that this development has necessarily and automatically restricted the operation of the objection to an assignment on the ground of champerty. The mere fact that a chose in action was assigned was not a conclusive proof of maintenance. Therefore the mere fact that the assignee benefited by the assignment cannot be regarded as a conclusive proof of champerty. It is only if there has been maintenance in fact that the question of champerty can arise;[7] for the essence of champerty is maintenance, coupled with an agreement that the maintainer shall have a share of the amount recovered in the action maintained.[8] These developments involved the consequence that it was no longer necessary to look at the relationship between the assignor and the assignee. It was no longer necessary, therefore, that the assignor

[1] Warmstray v. Tanfield (1628-1629) 1 Ch. Rep. 29; Squib v. Wyn (1717) 1 P. Wms. at p. 381.

[2] 36, 37 Victoria c. 66 § 25 (6).

[3] "I think the words 'debt or other legal chose in action' mean 'debt or right which the common law looks on as not assignable by reason of its being a chose in action, but which a court of equity deals with as being assignable,'" Torkington v. Magee [1902] 2 K.B. at pp. 430-431 *per* Channell, J.; but the phrase "legal chose in action" is not a very happy one to express "a thing regarded by the common law as a chose in action."

[4] Prosser v. Edmonds (1855) 1 Y. and C. (Ex.) 481; Dawson v. Great Northern and City Railway [1905] 1 K.B. at pp. 270-271 *per* Stirling, L.J.

[5] It would seem from the case of Deering v. Farrington (1674) 3 Keb. 304 that Hale, C.J., was inclined to take this view at this early date; at the end of the eighteenth century Buller, J., could say that, "it is laid down in our old books, that for avoiding maintenance a chose in action cannot be assigned or granted over to another. The good sense of the rule seems to me to be very questionable; and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action in any case," Master v. Miller (1791) 4 T.R. at p. 340.

[6] Comm. ii 442.

[7] On this point see the remarks of McCardie, J., in County Hotel Co. v. L.N.W.R. [1918] 2 K.B. at pp. 258-260; the view of the law stated in the text will perhaps help to meet one of the difficulties stated by McCardie, J., in the passage cited.

[8] Co. Litt. 368b; James v. Kerr (1889) 4 C.D. at p. 456 *per* Kay, J.

should be the debtor of the assignee. It followed that a creditor could, by making the assignee his attorney, assign his debt to anyone. The appointment of an attorney had come to be a formality —though to the end it was a necessary formality.[1] In this way the common law managed to maintain in theory its doctrine that a chose in action was unassignable, while abandoning it in practice in the case of debts. The further inroads upon this theory made by equity and by legislation belong to a later period in the history of the law, and I shall deal with them in a subsequent Book.

It is fairly clear that the common law was induced to connive at the introduction and extension of this evasion of its principle that a chose in action is not assignable, by considerations of mercantile convenience or necessity. But this exception only applied to debts; and even equity did not go the length of permitting all contractual rights to be assigned in this manner. Some were too personal in their character to permit of any kind of assignment, and others were too uncertain. But these limitations upon the power to assign can be better explained when rights of action of a purely delictual kind have been dealt with.

(iii) In the common law the sphere occupied by actions in tort is very wide. We have seen that the actions of replevin and detinue were recognized from the first as being of a mixed proprietary and delictual character;[2] and that the action of trover, which came to be the action generally used by owners who sought to recover their chattels, was at first purely delictual in character, and only gradually acquired proprietary characteristics.[3] With these causes of action in tort which were of a proprietary character I have already dealt. We have seen that, from a comparatively early date, there was a tendency to think that the rights of the owner of chattels who was not in possession should be assignable, and that the assignee should be able to sue; but that the fact that the rights of owners of land who were not in possession could not be assigned, and the great importance attached to the prevention of maintenance, prevented the clear recognition of the fact that such rights could be assigned till modern times.[4] On the other hand, no relaxation has ever been suggested in the rule that a right of action for unliquidated damages for a tort to property or to the person is unassignable.[5] Such claims were not debts; and they were both too uncertain and too personal to admit of the

[1] Bl. Comm. ii 442; cp. Mallory v. Lane (1615) Cro. Jac. 342, where it is recognized that the delivery of statutes merchant, without a power of attorney to sue, was not an assignment of the statutes.

[2] Vol. ii 366-368; vol. iii 283-285, 325-327, 337; above 437-440.

[3] Above 440-444.

[4] Above 533-534.

[5] Dawson v. Great Northern and City Railway [1905] 1 K.B. at p. 271 *per* Stirling, L.J.; above pp. 524, 534.

application to them of the indirect method of assigning debts, by the process of making the assignee the attorney of the assignor.[1] Clearly these considerations apply also to certain rights arising out of contract. A contract may stipulate for services of so personal a character, that to allow an assignment of rights under it would be unfair to the contracting parties;[2] or, if a contract has been broken, the amount of damages recoverable may be too uncertain to permit of assignment.[3] But it was not till certain classes of rights, recognized as choses in action by the common law, became more freely assignable in equity, that it became necessary to distinguish between the cases in which assignment was permitted and cases in which it was not; and it is for this reason that we find very little clear authority on these questions till quite modern times. Until it became necessary to draw this distinction authority was hardly needed for the obvious proposition that these choses in action were unassignable. As the result of the modern discussions on the limitations of the right to assign, it would seem that, subject to exceptions which modern cases appear to have allowed, either, if the assignment of certain of these rights of action in tort is merely incidental to an assignment of property,[4] or if such assignment comes within the scope of the application of the doctrine of subrogation to the rights of insurers,[5] the modern law refuses to allow the assignment of a right to sue in tort for a merely personal wrong, and for damages of uncertain amount. It would seem that it applies the same rule to rights of action for damages of uncertain amount arising under contracts; but that both in cases of tort, and a fortiori in cases of contract, an assignment of the fruits of an action, if and when recovered, is valid.[6] But the law is not as yet finally settled; and, as McCardie, J., has pointed out,[7] it "requires broad juristic consideration and decision by an appellate tribunal in the light of modern circumstances."

In laying down these rules the judges have, for the most part unconsciously, followed lines of reasoning which their predecessors followed in solving different, but somewhat analogous problems. From an early date the courts were faced, firstly, with the problem of the extent to which the maxim *actio personalis moritur cum*

[1] Thus in 1456 Wangford *arg.* said, "Sir jeo entend que un duty de chose que (est) certain poit estre assez bien assigne pur un satisfaction; mes de chose (que) est non certain come en le cas de Trespass jeo grant bien" (i.e. that it cannot be assigned); and to this Prisot, C.J., agreed, Y.B. 34 Hy. VI. Mich. pl. 15.

[2] Robson v. Drummond (1831) 2 B. and Ad. 303; Stevens v. Benning (1854) 1 K. and J. 168.

[3] Torkington v. Magee [1902] 2 K.B. at p. 434.

[4] Williams v Protheroe (1829) 5 Bing. 309; Dawson v. Great Northern and City Railway [1905] 1 K.B. at p. 271.

[5] King v. Victoria Insurance Co. [1896] A.C. 250.

[6] Glegg v. Bromley [1912] 3 K.B. 474; above 534.

[7] County Hotel Co. v. L.N.W.R. [1918] 2 K.B. at p. 260.

persona interfered with the transmissibility on death of rights and liabilities arising from contract and tort; and, secondly, with the problem of the limits of the king's rights to the choses in action of an outlaw or a felon. Of the first of these problems I have already spoken. We have seen that rights of action for unliquidated damages for torts against person or property, and for the breach of contracts which involve personal skill or the continuance of the deceased's personality, were not at common law (apart from statutory modifications) transmissible on death; but that a right to recover property taken by the deceased and added to his estate has always been transmissible.[1] Clearly these rules rest on principles which are based on considerations very similar to those now applied to determine whether or not a chose in action is assignable. The second of these problems is indirectly connected with the problem of assignability, but it falls more properly under the following head:

The relation of these choses in action to other branches of the law.

The first of the branches of the law which have helped to elucidate the legal incidents of choses in action is the law as to the king's rights to the chattels of persons outlawed or attainted. I shall deal first with this branch of the law; and then more briefly with the other branches of the law which have contributed to this elucidation.

(i) From the earliest days of the common law it had been recognized that the king could assign a chose in action.[2] This exceptional rule was no doubt due to the king's extensive rights to forfeiture on an outlawry or on a conviction for treason or felony.[3] Unless the king had been allowed to assign these rights his revenue would have suffered. Moreover, an additional reason, based on much the same principle, was found in the fact that such a power was essential in order to enable him to deal with debts due to him from his officials,[4] and in order to enable him so to deal with the proceeds of taxes granted to him that they could be made to produce an immediate revenue.[5] It was probably for the

[1] Vol. iii 576-582, 584-585.

[2] As Sir F. Pollock points out, before the Jews were expelled from England, vol. i 46, the king "claimed and exercised an arbitrary power of confiscating, releasing, assigning, or licensing them to assign the debts due to them," Contracts (9th ed.) App. 752; the Y.BB. accept the rule as well settled, Brooke, Ab. *Chose in Action* pl. 1 = Y.B. 3 Hy. IV. Mich. pl. 34; pl. 6 = Y.B. 2 Hy. VII. Mich. pl. 25.

[3] Pollock, op. cit. 752.

[4] See Y.B. 39 Hy. VI. Mich. pl. 36, where it was said that "le comon cours de l'Exchequer est, quand le Roy per ses lettres done ou grant un duity que est due a luy per ascum, le grantee le Roy de ce det aura bon action a son nom sole, et issint ne puit nul autre faire."

[5] See Y.B. 1 Hy. VII. Hil. pl. 5, where there was a question as to assignments of money in the hands of the collectors of the tithes granted to Richard III.

same reasons that these rights of the king tended to expand. Not only could the king assign, but the king's grantee was allowed to sue in his own name;[1] and anyone was allowed to assign a chose in action to the king.[2]

These exceptional rules were the more necessary because, in some respects, the king's rights over choses in action personal were larger than his rights over choses in action real. In the case of choses in action personal, a mere right of action was forfeited to the king; but, in the case of choses in action real, it was decided, doubtless from motives of public policy, that a mere right of action was not forfeited to the crown.[3] But, though the rights of the crown to choses in action personal were wide, they were not unlimited. It was recognized that there were some rights of action of so personal and so uncertain a character that they would not pass to the king. Thus it was laid down in Edward III.'s reign that debts, on which the debtor might wage his law, could not pass to the king;[4] and in Edward IV.'s reign that the same principle was applicable to a right to sue in trespass for damages.[5] But, in the sixteenth century, wager of law was being discouraged and circumvented as far as possible, and the older precedents were not wholly consistent;[6] so that it is not surprising that, on grounds of public policy and in accordance with the practice of the Exchequer, it was held in *Slade's Case* that such debts were forfeited.[7] On the other hand, the view that the right to sue for unliquidated damages for trespass was too uncertain to be forfeited, prevailed. We have seen that in 1456 the same test was suggested to determine whether or not a chose in action was assignable;[8] and that this is in substance the test applied by the judges at the present day for this purpose.[9]

(ii) We have seen that at common law all the wife's chattels

[1] Above 539 n. 4. [2] Y.B. 21 Hy. VII. Hil. pl. 32.

[3] "Note a diversity between inheritances and chattels; for, as it hath been said, a right of action concerning inheritances is not forfeited by attainder, but obligations, statutes, recognisances etc., and other such things in action are forfeited to the king by attainder, or outlawry," Winchester's Case (1583) 3 Co. Rep. at f. 3a.; the reason why "a right of action concerning inheritances" is not forfeited is said to be that, "it would be very vexatious and inconvenient that estates of purchasers and others, after many descents and long possession, should be impeached at the king's suit . . . against the reason and rule of the common law," ibid at f. 2b; see The King v. The Executors of Daccombe (1619) Cro. Jac. 512, where it was held that a lease of the right to supply wine to the king, which was held on trust, was forfeited on the attainder of the cestui que trust.

[4] Brooke, Ab. *Chose in Action*, pl. 9; 16 Ed. IV. Pasch. pl. 49; Anon. (1567) Dyer 262a.

[5] "Fuit dit que le Roy poct granter son action que est certein, come de det al Roy, mes nemy de trespass fait al Roy, que est non certein," Y.B. 5 Ed. IV. Mich. pl. 22.

[6] Fitzherbert, Ab. *Corone* pl. 343 (3 Ed. III.)

[7] (1602) 4 Co. Rep. at ff. 95a, 95b; Bullock v. Dodds (1819) 2 B. and Ald. at pp. 275-276 *per* Abbott, C.J.

[8] Above 538 n. 1. [9] Above 538; cp. L.Q.R. x 157.

passed to her husband. But, for this purpose, a chose in action was not a chattel. The husband could reduce it into his possession, but, till he had done so, it was not his; and, if he died without reducing it into his possession, it remained the property of the wife.[1] Again, the fact that a chose in action was evidenced by a written document, did not make it any the less a chose in action. Therefore the document, being *per se* valueless, could not be the subject of larceny.[2] For somewhat similar reasons, neither a chose in action nor the document which evidenced it, could be seized under a writ of fieri facias.[3] The chose in action was not a tangible thing which admitted of physical seizure, and the document was not saleable.[4] It is true that by the special customs of London and certain other cities, and by virtue of a writ of execution issued at the suit of the crown, debts owed to a debtor could be attached by a creditor.[5] But it was not till 1854 that this principle was introduced into the common law by the Common Law Procedure Act passed in that year.[6] It was only by virtue of the interpretation put upon the provisions of the old Bankruptcy Acts, that the choses in action of a bankrupt were made available for his creditors;[7] and in this case, as in the case of assignability, we must make an exception in the case of rights which arise from causes of action of a purely personal character.[8]

It is clear from these illustrations that the law started from the idea that a chose in action is a personal non-assignable right. But, having found that a rigid adherence to the theory was in practice inconvenient and impossible, it has partially modified it in many different directions; and these modifications have been carried further both by equity and by the Legislature. The result is that, though very little is left of the broad principle from which the law started, it is necessary to know it, because it is still operative unless it has been modified by the common law, by equity, or by statute. We shall now see that the difficulties arising from these causes have been increased by the further modifications

[1] Vol. iii 527. [2] Ibid 368.

[3] See Ex pte. Foss (1858) 2 De G. and J. at p. 237 *per* Knight-Bruce, L.J.; Colonial Bank v. Whinney (1886) 11 A.C. at p. 439 *per* Lord Blackburn.

[4] Frances v. Nash (1734) Case t. Hard. 53. [5] Vol. i 240; vol ii 387.

[6] "We are not aware of any process either in the superior courts of law or equity, in suits between subject and subject, by which this can directly be done, though the course of proceeding under writs of execution at the suit of the crown, and by way of foreign attachment in the Mayor's Court of London and some other cities, as well as in the courts of many foreign countries, shows that such a remedy would be practical and useful. . . . We recommend that a creditor, having obtained a judgment, should be allowed to proceed, by a process similar to foreign attachment, against the debtors of his debtor," Second Report of the Commission to enquire into the Process Practice and System of Pleading of the Courts of Common Law, Parlt. Papers (1852-1853) xl 740; 17, 18 Victoria c. 125 §§ 60-67.

[7] L.Q.R. x 316 n. 4.

[8] Beckham v. Drake (1849) 2 H.L.C. at pp. 626-628 *per* Parke, B.

which have necessarily been made in those other classes of choses in action which, as we have seen,[1] emerged during the seventeenth and eighteenth centuries.

(2) The legal incidents of the later varieties of choses in action.

The later varieties of choses in action all differ from the original class of choses in action in that they are assignable. Negotiable instruments were, as we shall see,[2] assignable by the law merchant. Stocks and shares were in early days expressly made assignable by charter or Act of Parliament.[3] Patent rights were by their terms always assignable.[4] We have seen that copyright, whether it depended upon the rules of the Stationers Company and the Licensing Acts, or upon royal grant, was always assignable;[5] and, when it came to be dependent on the terms of the Act of 1709, it was assignable by the express provisions of the Act.[6]

In respect, however, to some of the other legal incidents of these choses in action, the law is not so clear or certain. Thus, at the beginning of the nineteenth century, it was a very doubtful question how, if at all, a husband could reduce into possession stock belonging to his wife. "It is obvious that if stock were a chose in action of the same nature as a debt or claim to goods, it could never be reduced into possession unless the government voluntarily redeemed it."[7] It was ultimately held that, if the husband got a transfer of the stock into his own name, he had reduced it into his possession.[8] What would amount to the reduction into possession of such choses in action as a copyright or a patent right does not seem to have been absolutely settled;[9] and the question is now of course academic. The rule that choses in action were not capable of being stolen, has produced much legislation to take certain classes of choses in action out of this rule. Thus, a statute of 1729[10] made it felony to steal "Exchequer orders or tallies or other orders entitling any other person or persons to any annuity or share in the parliamentary fund, or any Exchequer bills, South Sea bonds, Bank notes, East India bonds, dividend warrants of the Bank, South Sea Company, East India Company, or any other company, society, or corporation."

In order to remedy the difficulty that these choses in action could not be taken in execution under a writ of fieri facias, the Judgments Act of 1838[11] enabled the sheriff to seize money, bank

[1] Above 530. [2] Vol. viii 157, 163-164. [3] Ibid 202-203.
[4] Williams, Personal Property (17th ed.) 43. [5] Vol. vi 364 seqq.
[6] 8 Anne c. 19 § 1. [7] L.Q.R. x 313.
[8] Ibid. [9] Ibid xi 236, 238-239.
[10] 2 George II. c. 25, cited L.Q.R. x 312-313; Stephens H.C.L. iii 144, 148.
[11] 1, 2 Victoria c. 110.

notes, cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money. But this did not enable all classes of choses in action to be seized to satisfy a judgment debt. In some cases equity intervened to remedy the hardship occasioned by the difficulty of realizing a claim. Thus, by means of the appointment of a receiver, it permitted a species of equitable execution.[1] But even this device is not wholly adequate, nor are the limits within which it is available wholly clear. In 1909, in the case of *Edwards v. Picard*, the question whether a receiver could be appointed of the receipts of the profits of certain patents, when it was not shown that the debtor was actually in receipt of any profits, divided the court of Appeal.[2] Similarly, the application of the Bankruptcy Laws to some of these choses in action has raised some very nice problems—largely because the draftsmen of these Acts have used the term "chose in action" without appreciating the fact that it covers a miscellaneous mass of very different things, which have or should have very different legal incidents.[3] Thus in 1885, in the case of *Colonial Bank v. Whinney*,[4] the question whether shares were taken out of the reputed ownership clause of the Bankruptcy Act of 1883, by the proviso in that clause excluding choses in action, also divided the court of Appeal.

It is thus apparent that the modern English law as to choses in action can hardly be called satisfactory; and this history shows that its unsatisfactory character is due mainly to the following causes: Firstly, the enormous extension given to the term has included in this category a very large number of things of very different kinds. Rules which were made for choses in action, when the term meant literally rights of action against some person, are obviously inapplicable to proprietary rights of an incorporeal nature; but it is clear that these rules must be applied to these rights, because they are choses in action, unless some authority—legislative or otherwise, can be produced, which shows that they are subject to some other rule. Secondly, even in the case of some of the original class of choses in action, the old rule of non-assignability has been gradually modified; and in this work of gradual modification both law and equity have lent a hand. The result has been that some of these choses in action have changed their original character and become very much less like merely personal rights of action, and very much more like rights of property. But this process has been retarded, and the whole question obscured, by the distorting influence of the fear of encouraging maintenance. Owing to the disorderly state of the country in the fifteenth and early sixteenth centuries, this fear

[1] See generally Halsbury, Laws of England xiv 115 seqq.
[2] [1909] 2 K.B. 903. [3] L.Q.R. xi 240. [4] 30 C.D. 261.

rightly exercised a large effect upon this branch of the law; but unfortunately its effect lasted long after the cause for it had been removed. The result has been that the development of the law was slow; and the slowness of the modification of the original conception of a chose in action, as a personal unassignable thing, has caused a long continued uncertainty in the modern law. Thirdly, a further source of complication has been added by the piecemeal exceptions introduced by the Legislature to the general rules applicable to choses in action, in favour of some or all of them. It is sometimes difficult to ascertain the sense in which the Legislature has used the term chose in action—we have seen that the Bankruptcy Act affords one illustration;[1] and, as we can see from the case of *Edwards v. Picard*,[2] the modifications introduced by the courts have sometimes occasioned a similar difficulty. Some of these difficulties might perhaps be mitigated by a codifying Act, for which there is plenty of material. But it is probable that a branch of the law, which comes at the meeting place of the law of property and the law of obligation, can never be anything but difficult to formulate and apply.

With the history of choses in action, we have reached the confines of the sphere of property, and approach the sphere of obligation. At this point, therefore, I finish the history of the law of property which has occupied this chapter and the last, and pass to the law of obligations which will be the chief subject of the next three chapters. In the course of these chapters we shall make closer acquaintance with the legal incidents of some of those things which English law has included in its large category of choses in action.

[1] Colonial Bank v. Whinney (1885) 30 C.D. 261. [2] [1909] 2 K.B. 903.

APPENDIX

I

3, 4 WILLIAM IV. C. 27, §§ 36-39

§ 36. And be it further enacted, that no Writ of Right Patent, Writ of Right quia dominus remisit curiam, Writ of Right in capite, Writ of Right in *London*, Writ of Right Close, Writ of Right de rationabili parte, Writ of Right of Advowson, Writ of Right upon Disclaimer, Writ De rationabilibus divisis, Writ of Right of Ward, Writ de consuetudinibus et servitiis, Writ of Cessavit, Writ of Escheat, Writ of Quo Jure, Writ of Secta ad molendinum, Writ de essendo quietum de Theolonio, Writ of Ne injuste vexes, Writ of Mesne, Writ of Quod permittat, Writ of Formedon in descender, in remainder, or in reverter, Writ of Assize of novel disseisin, Nuisance, Darrein-presentment, Juris utrum, or Mort d'ancestor, Writ of Entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, Writ of Entry sur intrusion, Writ of Entry sur alienation dum fuit non compos mentis, Dum fuit infra ætatem, Dum fuit in prisona, Ad communem legem, In casu proviso, In consimili casu, Cui in vita, Sur cui in vita, Cui ante divortium, or Sur cui ante divortium, Writ of Entry sur abatement, Writ of Entry Quare ejecit infra terminum, or Ad terminum qui præteriit, or Causa matrimonii prælocuti, Writ of Aiel, Besaiel, Tresaiel, Cosinage, or Nuper obiit, Writ of Waste, Writ of Partition, Writ of Deceit, Writ of Quod ei deforceat, Writ of Covenant real, Writ of Warrantia chartæ, Writ of Curia claudenda, or Writ Per quæ servitia, and no other Action real or mixed (except a Writ of Right of Dower, or Writ of Dower unde nihil habet, or a Quare impedit, or an Ejectment,) and no Plaint in the Nature of any such Writ or Action (except a Plaint for Freebench or Dower), shall be brought after the Thirty-first Day of *December* One thousand eight hundred and thirty-four.

§ 37. Provided always, and be it further enacted, that when, on the said Thirty-first Day of *December* One thousand eight hundred and Thirty-four, any Person who shall not have a Right of Entry to any Land shall be entitled to maintain any such Writ or Action as aforesaid in respect of such Land, such Writ or Action may be brought at any Time before the First Day of *June* One thousand eight hundred and Thirty-five, in case the same might have been brought if this Act had not been made, notwithstanding the Period of Twenty Years herein-before limited shall have expired.

§ 38. Provided also, and be it further enacted, That when, on the said First Day of *June* One thousand eight hundred and Thirty-five, any Person whose Right of Entry to any Land shall have been taken away by any Descent cast, Discontinuance, or Warranty, might maintain any such Writ or Action as aforesaid in respect of such Land, such Writ or Action may be brought after the said First Day of *June* One thousand eight hundred and Thirty-five, but only within the Period during which by virtue of the Provisions of this Act an Entry might have been made upon the same Land by the

Person bringing such Writ or Action if his Right of Entry had not been so taken away.

§ 39. And be it further enacted, that no Descent cast, Discontinuance, or Warranty which may happen to be made after the said Thirty-first day of *December* One thousand eight hundred and Thirty-three shall toll or defeat any Right of Entry or Action for the Recovery of Land.

II

AN ELIZABETHAN BILL AGAINST PERPETUITIES

HOUSE OF LORDS MSS., CALENDARED THIRD REPORT HIST. MSS. COMMISSION, 10

An Act to take awaie future uses creatinge perpetuities of lands in speciale cases.

Forasmuch as perpetuities by creating future uses happening long after engender discord & faction in families make children disobediente, parents vnnaturall, upon conceit yt the lands stand secured.

Forasmuch as yt is founde by experience that perpetuities of landes created by lymitacõn of future uses appointed to arise in one vppon attempts of alienacõn of an other and such like accidents happeninge longe after the estates executed of the same Landes doe not only engender discorde in all families where they light and drawe the whole kindred into faction, but doe also make Children disobedient and parents vnnaturall, vppon conceipt that the same landes stande secured by the said uses against any acte that the possessor thereof can doe, althoughe he have the freehold and inheritance in himself. And forasmuch as many purchasers are often and usually defrauded by such future springinge uses, and the owners of inheritance of landes restrayned from raysinge money by sales or from exchanginge Lands for lands vppon any occasion whatsoever ; and this by reason of a construction of allowaunce of such uses made vppon the Statute of the 27, yere of Kinge H, 8 against the true meaninge of the said statute, beinge in trueth provided to extinguishe such uses as the preamble reciteth, and therebie great suits are entertayned and like daylie to increase in her maties Courts to the great expence of money and disablinge of her subiects. Be yt therefore enacted by thaucthoritie of this p'sent pliament that all lymitacõns by uses or willes made or hereafter to be made for any manner of restrayninge of any pson or psons that hath or shall have any estate of inheritaunce in any lands tenements or hereditaments from sellinge demisinge or assuringe the same landes tenemts or hereditamts or any pte therof shalbe vtterlie voide and of non effect. And that ev'ie pson and psons havinge or wch shall have suche estate of inheritaunce wherto any such or the like restraint is or shalbe annexed or added shall and maie have hold use and enioye the said Landes tenements and heriditaments accordinge to theire said estates of inheritaunce in everie respect dischardged of such restraints and as if no such clause or provision of restraynte had bin had or made. Provided allwaies and be yt enacted that this Act nor any thinge herein contayned shall extend to impeach, hinder or take awaie any estate right title or interest heretofore accrued happened or growen to any pson or psons uppon or by reason of any breach of any clause or provision of restraint heretofore expressed in any writtinge of limitacõn of use or in any last will and testament in writtinge, but that all and ev'ye such pson and psons theire heires successors executors administrators and assignees accordinge to such theire estate right title and interest shall and maie have use and take theire advantages by entries accõns

And because purchasors are often defrauded by such springing uses to the owners restrayned to sell thr. landes or to exchange them for any occasion whatsover.

And this by reason of a construccon of the Statute of 27 H. 8 being against ye meaninge throf whereby greate suites have and doe arise.

Enactet, yt all limitation of vses for restraining persons yt have estates of inheritance in landes from selling, or demising them, shalbe voide and yt such as have any such estate in landes, wth suche a restraint shall hold them discharged of that restraint.

or other recov'ies in such sort and non otherwise as they might have done if this Act had never bin had nor made. Proviso, it shall not impeach the state of any person accrued heretofore by reason of the breach of any such restraint.

[Endorsed :] An Act to take away future uses, creating perpetuities of landes,
Jouis XIX° Januar 97
The ffirst readinge.

III

A STRICT SETTLEMENT OF THE SEVENTEENTH CENTURY

BRIDGMAN'S CONVEYANCES (2ND ED.) 196-211

A Settlement before Marriage by Lease and Release, limiting an Annuity to the Wife for Joynture, and the Inheritance to the first Son, &c.

THIS INDENTURE made the, &c. Between W.P. of, &c, of the the one part. and H.S. of, &c. and F.S. &c. Son and Heir apparent of the said H.S. of the other part: *Whereas* a Marriage is intended by the Grace of God to be shortly hereafter had and solemnized between the said W.P. and S.S. Daughter of the said H.S. *And whereas* also, the better to enable the said W.P. to grant, release and convey the Manors, Messuages, Lands, Tenements and Hereditaments, herein after mentioned, unto the said H.S. and F.S and their Heirs, to such uses, intents and purposes, and in such sort manner and form, as the same are herein after mentioned, to be by these Presents granted, released and conveyed. *He* the said W.P. by his Indenture of Bargain and Sale, bearing date the day next before the day of the date hereof, in Consideration of the Sum of . . . therein mentioned, *Did* bargain and sell unto the said H.S. and F.S. *All* those the Manors, Lordships and Farms of P.S.B.B. and A. in the said County of B. with their and every of their Rights, Members and Appurtenances: And all and singular the Capital messuages, commonly called or known by the Name of P. *Place* and B. with their and either of their Appurtenances in the Said County of B. And all Messuages, Houses, &c. whatsoever, to the said several Manors, Lordships, Farms and Capital Messuages, or any of them respectively belonging, or, &c. AND ALSO, all those the several Rectories or Parsonages of P. and Little M. with their and either of their Appurtenances; and all Glebe Lands, Tithes, Pensions, Portions, Oblations, Obventions, Profits, Fruits and Emoluments to the same belonging, or in any wise appertaining in the said County of B. Together also with the several Advowsons, Patronages, Rights of Patronage, Gifts, Presentations, and free Dispositions, of, in and unto the several Vicarages of the several Churches of P. and Little M. aforesaid. And also all the singular other the Manors, Lordships, Farms, Messuages, Rectories, Advowsons, Tithes, Lands, Tenements, Rents, Reversions and Hereditaments whatsoever of him the said W.P. or whereof, or wherein he or any other Person or Persons whomsoever, in Trust for him or for his use, now hath, or ever had any manner of Estate of Inheritance in Possession, Reversion or Remainder, situate, lying, being, coming, growing, happening, arising or renewing within the Manors, Lordships, Towns, Parishes, Villages, Hamlets, Liberties, Precincts, Territories or Places of P. Little M.B.D. W.C. and A. and in every or any of them, or elsewhere in the said County of B. And also all and singular Houses, Edifices, Buildings, Barns, Stables, Yards, Orchards, Gardens, Backsides, Lands, Tenements, Meadows, Leasows, Pastures, Feedings, Closes, Inclosures, Woods, Under-woods, Trees, Rents, Recital of the Lease.

Reversions, Ways, Paths, Waters, Streams, Fishings, Fishing-places, Watercourses, Parks, Chases, Warrens, Wastes, Commons, Furzes, Heaths, Moors, Common of Pasture and Turbary, Sheep-walks, Foldage, Suit-multure, Courts-Baron, Courts-Leet, View of Frank-pledge, Perquisites and Profits of Courts and Leets, Knights-Fees, Wards, Marriages, Homages, Fealties, Reliefs, Escheats, Heriots, Fines, Amerciaments, Goods and Chattels of Felons and Fugitives, of Persons attainted, and of persons outlawed and put in Exigent, and of Felons *de se*, Deodands, Waifs, Estrays, Treasure-trove, Markets, Fairs, Profits and Tolls of Markets and Fairs, Fines, Forfeitures, Mines, Quarries, Delfs; And all other Royalties, Franchises, Liberties, Rights, Jurisdictions, Priviledges, Immunities, Profits, Commodities, Emoluments, Advantages, Easements, Hereditaments and Appurtenances whatsoever, to the said several Manors, Lordships, Farms, Rectories, Lands, Tenements and Premisses, or to any of them, or to any part or parcel of them, or any of them

Habend. respectively, lying, being, belonging, or, etc. TO HAVE AND TO HOLD the said Manors, Lordships, Farms, Rectories, Messuages, Lands, Tenements, Tithes, Rents, Reversions, Services, Hereditaments, and all and singular other Premisses whatsoever, thereby bargained and sold, with their and every of their Appurtenances unto the said H.S. and F.S. their Executors, Administrators and Assigns, from the first day of this instant—for and during the full Term of One whole year, from thenceforth next ensuing, and fully, &c. as in and by the said Indenture (relation, &c.) appear, *By force and virtue* of the said Indenture, and of the Bargain and Sale therein mentioned, the said H.S. and F.S. do now at the time of the Sealing and Delivery hereof, stand lawfully possessed of and in the said Manors, Lands, Tenements, Hereditaments and Premisses, whatsoever, thereby bargained and sold, for and during all the residue of the said Term therein yet to come and unexpired.

Consideration. NOW THIS INDENTURE WITNESSETH, That in Consideration of the said Marriage, and of the Sum of 3000 *l.* of lawful, &c, to the said W.P. in hand paid by the said H.S. at and before the Sealing and Delivery of this present Indenture, for the Marriage-portion of the said S.S. his Daughter. The Receipt of which Sum the said W.P. doth hereby acknowledge; and thereof, and of every part thereof, doth clearly and absolutely acquit, exonerate and discharge the said H.S. his Executors and Administrators, for ever by these presents. *And* for the setling and assuring of a competent Joynture and Maintenance for the said S.S. during her life: *And also* for the setling, conveying, and assuring of all and singular the said Manors, Lordships, Farms, Messuages, Lands, Tenements, Rectories, Tithes, Hereditaments and Premisses, in such sort, manner and form, and to and for such uses, intents and purposes, as the same respectively are herein aftermentioned, to be setled and conveyed. And for divers other good Causes and Considerations, him the said W.P. especially moving, *He* the said W.P. hath granted, remised, released, aliened, enfeoffed and confirmed, and by these Presents, for him and his Heirs, doth grant, remise, release, alien, enfeoff and confirm unto the said H.S. and F.S. their Heirs and Assigns: And also, *All and singular* the said Manors, Lordships, Farms, Messuages, Rectories, Advowsons, Lands, Tenements, Tithes, Rents, Reversions, Services, and all and singular other the Hereditaments and Premisses whatsoever, with their and every of their Appurtenances in and by the said recited Indenture bargained and sold, or mentioned to be bargained and sold.

AND ALSO the Reversion and Reversions, Remainder and Remainders thereof, and of every of them: And all Rents, Services, and Profits, to them or any of them, incident, belonging or appertaining. *And also* all and every the Estate and Estates, Right, Title, Interest, Use, Possession, Property, Trust, Claim and Demand whatsoever, of the said W.P. of, in and to all and

singular the said Manors, Lordships, Farms, Rectories, Advowsons, Messuages, Lands, Tenements, Tithes, Hereditaments and Premisses whatsoever, hereby granted, or mentioned to be granted, and of, in, and to every part and parcel thereof: TO HAVE AND TO HOLD the said Manors, Lordships, Farms, Rectories, Advowsons, Messuages, Lands, Tenements, Tithes, and all and singular other the Hereditaments and Premisses whatsoever, hereby granted, or mentioned to be granted, with their and every of their Appurtenances, unto the said H.S. and F.S. their Heirs and Assigns for ever; To the several uses, behoofs, intents and purposes, and with and under the several Limitations, Powers, Authorities, Liberties, Proviso's and Agreements hereafter, in and by these presents declared, mentioned, limited and expressed: And to and for none other use, intent or purpose whatsoever; that is to say, *As for and concerning* the said Manor of B. and the said Farm or Tenement called B. and all the Lands and Hereditaments thereunto belonging, with the Appurtenances: And the said Rectory or Parsonage of little M. aforesaid, with all the Glebe-lands, Tithes, Profits, Commodities, Hereditaments, and Appurtenances whatsoever, thereunto belonging; Together also with the said Advowson, Gift, Presentation and Right of Patronage, of, in and to the said Vicarage of the Church of Little M. aforesaid: And the Reversion and Reversions, Remainder and Remainders, of the said Manor, Farm or Tenement, Rectory, Advowson and Premisses last mentioned: *To the only use* and behoof of the said W.P. his Heirs and Assigns for ever: and to none other use or uses, intent or purpose whatsoever.

Habend.

Uses.

As to part of the Premisses.

To the Grantor and his Heirs.

AND AS FOR and concerning all and singular the said Manors, Lordships, Farms, Messuages, Rectories, Advowsons, Lands, Tenements, Tithes, Rents, Reversions, Services, Hereditaments and Premisses whatsoever, hereby granted, released and conveyed, or mentioned to be granted, released or conveyed, with their and every of their Appurtenances: And the Reversion and Reversions, Remainder and Remainders thereof, and of every of them; other than the said Manor of B. and the said Farm or Tenement called B. and the said Rectory of Little M. and the Advowson or Vicarage of the Church of Little M. aforesaid, *To the use* and behoof of the said W.P. for and during the Term of his Natural Life, without impeachment of or for any manner of Waste, and with full power to do and commit Waste: And with such farther Powers, Liberties, Authorities and Proviso's, as is herein after mentioned and expressed. And from and after the determination of that Estate, *To the use* and behoof of H.K. of the *Inner Temple* L. Gent. his Heirs and Assigns, for and during the natural life of the said W.P. upon Trust only, for preserving the contingent Uses and Estates herein after limited, and to make Entries for the same, if it shall be needful: but that the said H.K. his Heirs or Assigns shall not convert the Rents, Issues or Profits thereof, or any part thereof, to his or their own use.

The residue of the Premisses.

To the Grantor for life.

Then to another person during the life of the Grantor in trust only to preserve contingent Remainders.

AND FROM and immediately after the death of the said W.P. to the intent and purpose that the said S.S. shall and may have and yearly receive, take and enjoy from and immediately after the death of the said W.P. for and during all the Term of her natural life, for and in the Name of her Joynture, and in full recompence, lieu, and satisfaction of all the Dower which she may, or otherwise might claim, have or challenge, in all or any the Manors, Lands, Tenements or Hereditaments of the said W.P. her intended Husband, one Annuity or yearly Rent-charge of 400 *li.* of lawful, &c. to be yearly issuing and going out of all and singular the said Manors, Lordships, Farms, Messuages, Lands, Tenements, Hereditaments and Premisses whatsoever, hereby granted, or mentioned to be granted; other than the said Manor called B. and the said Farm or Tenement called B. and the said Rectory of Little M. and the Advowson of the Vicarage of Little M. aforesaid.

Then that the Wife if she survives may receive an Annuity for her life in lieu of Joynture.

And to be paid unto the said S.S. and her Assigns at four usual Feasts or Terms in the year (that is to say) the Feasts of St. M. the Archangel, &c. by even and equal Portions: *The first Payment* thereof to be made at such of the said Feasts as shall first happen after the decease of the said W.P.

A *Nomine Pœnæ* for Non-payment.

AND ALSO TO THE INTENT and purpose, That if it shall happen, the said yearly Rent of 400 *li.* or any part thereof to be behind or unpaid, in part or in all, by the space of 30 days next after any of the said Feasts or Times whereon the same ought to be paid, That then the said S.S shall and may have and take the Sum of 5 *l.* for every Twenty days wherein the said yearly Rent shall be so behind and unpaid, afterwards in the Name of a Peyn to be forfeited and lost by such person or persons, as from time to time ought to pay the said yearly Rent.

Clause of Distress.

AND ALSO TO THE FARTHER INTENT and purpose, That if it shall happen the said yearly Rent of Four hundred Pounds, or any part thereof, or any of the said Sums of Five pounds, so to be forfeited and lost in the Name of a Peyn, as aforesaid, or any of them to be behind or unpaid in part, or in all, at any of the said Feasts or Times whereon the same ought to be paid; That then and from thenceforth, and so often and from time to time, as the said Annual Rent, or any part thereof, or any sum or sums of Five pounds so to be lost in the Name of a Peyn, as aforesaid, or any part thereof shall be behind and unpaid, and whensoever any part of the said Rent or Sums so to be lost in the Name of a Peyn, shall be behind and unpaid, at, or after any of the said Feasts or Times whereat the same ought to be paid, as aforesaid. It shall and may be lawful to and for the said S.S. and her Assigns, into all and singular the said Manors, Lordships, Farms, Messuages, Lands, Tenements, Hereditaments and Premisses whatsoever, out of which the said yearly Rent is appointed to be issuing, as aforesaid, and into every or any part or parcel thereof, to enter and distrain; and the Distress and Distresses, then and there found and taken, to lead, drive, chase, carry, impound, detain and keep until the said yearly Rent, and all Arrerages thereof (if any shall be) and all Sum and Sums of Mony lost in the Name of a Peyn, as aforesaid, (if any shall be) shall be satisfied and paid.

Joyntress to pay Taxes out of her Annuity.

YET NEVERTHELESS It is hereby declared, expressed, concluded, and fully agreed by and between all the said parties to these presents, and the true intent and meaning of them, and every of them, is That the said S.S. and her Assigns, shall in respect of the said Rent, pay, bear and allow a proportionable part of all publick Taxes, Charges and Assessments, to be taxed, assessed, or imposed, upon or by reason of the Lands and Hereditaments out of which the said yearly Rent is to be issuing, as aforesaid, ratably and preportionably, according to the said Rent, and the true yearly value of the Lands out of which it is appointed to be issuing, as aforesaid, and during the continuance of the respective Rents or Annuities, payable unto S.P. Mother of the said W.P. and to A.D. Esquire, respectively shall bear and allow for their respective Rents or Annuities.

The Premisses to two Persons after the decease of the Husband for thirty years if the Wife so long live.

AND AS FOR AND CONCERNING all and singular the said Manors, Lordships, Farms, Messuages, Rectories, Advowsons, Lands, Tenements, Tithes, Rents, Reversions, Services, Hereditaments and Premisses, whereof the use is herein before limited to the said W.P. during his natural Life, charged or chargeable, as aforesaid, from and immediately after the decease of him the said W.P. if, and in case the said S.S. shall happen to survive him: *To the use* and behoof of F.N. of C. in the County of Y. Esquire, and S.N. Gent. Son and Heir apparent of the said F.N. their Executors and Administrators, for and during the space and Term of Thirty years, to be accounted from the day of, &c. now last past, before the Date hereof, fully to be compleat and ended, if the said S.S. shall so long live, upon Trust, for the better

securing of the true payment of the said yearly Rent of Four hundred pounds above limited ; to and for the said S.S. in such sort, manner and form, as is herein after mentioned, expressed and declared, concerning the same Term and Estate of Thirty years ; In regard there are some Leases of several parts of the several Premisses now in being, during which Leases the said S. will not have a full and sufficient remedy by way of Distress for the said Rent, in case the same should be arrear, And from and after the end, or other Determination of the said Estate and Term of Thirty years, Or in case of the not being thereof, Then from and immediately after the Decease of the said W.P. of all and singular the said Premisses, charged or chargeable nevertheless as aforesaid, *To the use* and behoof of the first Son of the said W.P. on the Body of the said S. to be begotten, and the Heirs males of the Body of such first Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the second son of the said W.P. on the Body of the said S. to be begotten, and the Heirs males of the Body of such second Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the third Son of the said W.P. on the Body of the said S. to be begotten, and the Heirs males of the Body of such third Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the fourth Son of the said W.P. on the Body of the said S. to be begotten, and the Heirs males of the body of such fourth Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the fifth Son of the said W.P. on the Body of the said S. to be begotten, and the Heirs males of the body of such fifth Son lawfully to be begotten, and for default of such Issue, To the use and behoof of the sixth, seventh, eighth, ninth, tenth, and all other Sons of the said W.P. on the Body of the said S. to be begotten severally and successively one after another, in order and course as they shall be in Order and Seniority of Age and Priority of Birth, and the Several Heirs males of their several and respective Bodies lawfully to be begotten, the elder of the said Sons, and the Heirs males of his Body being always preferred before the younger, and the Heirs males of their Bodies ; And for default of such Issue, To the use and behoof of the said H.S. and F.S.W.S. of A. in the County of B. and G.G. of B. aforesaid, Gent. their Executors, Administrators and Assigns, for and during the term of 99 years from thenceforth next ensuing, fully to be compleat and ended without Impeachment of Wast (Other than voluntary Wast in the Houses and Buildings upon the Premisses, and in such Trees as are about the site of the Capital Messuage of P. aforesaid, and are for Ornament or Defence thereof) and with liberty and power to fell, cut, and take any Timber or Wood, in or upon the Premisses, or any part thereof (other than such Trees as aforesaid) NEVERTHELESS upon such Trusts and Confidences as are herein after mentioned and declared concerning the same Term of years and Estate, and from and after the End, Surrender or other Determination of the said Term of 99 years, Then to the use of the Heirs males of the body of the said W.P. lawfully to be begotten ; And for default of such Issue, To the use and behoof of E.P. Brother of the said W.P. for and during the Term of the natural life of him the said E.P. without impeachment of or for any manner of Wast, and with liberty and power to commit Wast, and with such further Powers, Liberties, Authorities, and Provisoes, as herein after is mentioned and expressed, And from and after his Decease, To the use and behoof of the first Son of the said E.P. lawfully begotten ; and of the Heirs males of the Body of such first Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the second Son of the said E.P. lawfully to be begotten, and of the Heirs males of the Body of such second Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the third Son of the said E.P. lawfully to be begotten, and

On Trust for better securing the Annuity by way of entry for non-payment in regard of some Leases in being during which the Wife will not have sufficient remedy by distress.

Then to the first Son of the Husband on the body of the Wife.

Second Son.

Third Son.

Fourth Son.

Fifth Son.

Sixth, seventh, eighth, ninth and tenth Sons.

Term of 99 years.

Heirs males of the Body of the Husband lawfully to be begotten.

Husbands, Brother, his first Son, &c.

of the Heirs males of the Body of such third Son lawfully to be begotten ; And for default of such Issue, To the use and behoof of the fourth Son of the said E.P. lawfully to be begotten, and of the Heirs males of the Bodies of such fourth Son, lawfully to be begotten ; And for default of such Issue, To the use and behoof of the fifth Son of the said E.P. lawfully to be begotten, and of the Heirs males of the Body of such fifth Son, lawfully to be begotten ; And for default of such Issue, To the use and behoof of the sixth, seventh, eighth, ninth, tenth, and all other the Sons of the said E.P. lawfully to be begotten successively one after another, in order and course as they shall be in Order and Seniority of Age and Priority of Birth, and the several Heirs males of their several and respective Bodies lawfully to be begotten ; The elder of the said Sons, and the Heirs males of his Body, being always preferred before the younger, and the Heirs males of their Bodies ; And for default of such Issue, Then in case any Wife of the said E.P. shall happen to be enseint with Child by him at the time of his Death, To the use and behoof of such Wife, until she shall be of such Child delivered or dye, which shall first happen in Trust for the benefit of such Child ; And if such after-born Child shall happen to be a Son, To the use and behoof of such after-born Son, and the Heirs males of his Body lawfully to be begotten ; And for default of such Issue, To the use and behoof of the right Heirs of the said W.P. for ever.

Wife enseint.

AND IT IS hereby declared, expressed, and fully agreed upon by and between all and every the said Parties to these present Indentures, That the said Estate and Term herein before limited unto the said E.N. and S.N. their Executors and Administrators for 30 years, if the said S.S. shall so long live, is upon special Trust and Confidence in them the said F.N. and S.N. their Executors and Administrators, reposed, That they the said F.N. and S.N. and the Survivors and Survivor of them, and the Executors and Administrators of the Survivor of them, shall permit and suffer the said several Sons of the said W.P. severally and respectively, and the Heirs males of the several and respective Bodies ; And for default of such Issue, the said H.S. F.S. W.S. and G.G. their Executors, Administrators and Assigns, during the said Term of 99 years to them limited as aforesaid ; And from and after the Surrender or Determination of that Estate, then the Heirs males of the body of the said W.P. And for default of such Issue, then the said E.P. and all and every the said several Sons of the said E.P. severally and respectively, and the Heirs males of their several and respective Bodies, and all and every other person and persons whatsoever unto whom the said Manors, Lordships, Rectories, Advowsons, Tithes, Messuages, Lands, Tenements, Hereditaments and Premisses are before in and by these Presents in use limited respectively, severally, and successively, when and as they shall by the intent and true meaning of these Presents, severally come to be seized or possessed of the next and immediate Estate of Free-hold, or for years expectant immediately upon the determination or ceasing of the said Term and Estate for 30 years, to have, receive, and take the Rents, Issues, and Profits of all and singular the same Premisses, so long as the said yearly Rent of 400 *l.* shall be truly paid unto the said S.S. and her Assigns, according to the intent of these present Indentures.

Trust as to the 30 years.

To permit the Heirs inheritable according to these presents to enjoy.

So long as the Annuity be payd.

AND after such time as any Default shall be made in the payment of the said yearly Rent of 400 *l.* or any part thereof, by the space of 30 days, And from time to time, as often as there shall be any such Default made, shall permit and suffer the said S.S. and her Assigns, to receive and take the Rents, Issues, and Profits of all and singular the Premisses, and of all Rents incident to the same Term, and reserved upon any Under-Lease made of the Premisses, and with Liberty unto the said *Sarah* to make Sale of Woods (except all such Trees as are about the Site of the said Capital Messuage at P. aforesaid, and

In default of payment to permit Joyntress to enjoy the profits till payment.

are for the Ornament or Defence thereof) until such time as the said yearly Rent of 400 *l.* and all Arrerages thereof, and all Costs and Damages by the said S.S. or her Assigns, to be sustained by means or occasion of the non-payment thereof, shall be fully satisfied unto the said S.S. and her Assigns; And after the said Rent and Arrerages thereof, and the said Costs and Damages shall be to the said S.S. and her Assigns, paid and satisfied, Then the said F.N. and S.N. and the Survivor of them, and the Executors and Administrators of the Survivor of them, shall from time to time, during the said Term, permit and suffer the said several Sons of the said W.P. severally, and respectively, and the Heirs males of their several and respective Bodies, and such other person and persons, as shall be seized or possessed of the next immediate Estate of the Freehold, or for years of the Premisses expectant as aforesaid, respectively, severally, and respectively, according as they shall be so seized or possessed thereof, to have and receive the Rents, Issues, and Profits thereof, according to the intent and true meaning of these Presents.

AND IT IS hereby declared, meant, and agreed by and between all and every the said parties to these presents, And the true intent and meaning of them, and every of them, and of these presents is, That the said Term and Estate, so as aforesaid limited unto the said H.S. F.S. W.S. and G.G. their Executors, Administrators and Assigns, for the said Term of 99 years, is upon this special Trust and Confidence, and to the intent and purpose, that in case the said W.P. shall have any one or more Daughter or Daughters, begotten on the Body of the said S.S. which shall be living at the time of the Commencement of the said Term of 99 years, Or that the said S. shall then be enseint and with Child of any Daughter or Daughters, begotten by the said W.P. That then they the said H.S. F.S. W.S. and G.G. or the Survivor of them, or their Executors or Administrators of the Survivor of them, shall by, with, and out of the Rents, Issues and Profits of the said Manors, Lands and Premisses, or by Sale or Demise thereof, or of any part thereof, for all or any part of the said Term, or by sale of Timber or Wood upon the Premisses (except such Trees as are before excepted) or by all or any of the said means or otherwise, as to them in their Discretions shall seem meet, levy and raise Monies for the Portion or Portions, and yearly Maintenance of such Daughter, or Portions, whether they be born before or after the Commencement of the said Term, in such sort and proportion, and to be paid in such sort, manner, and form as is herein after mentioned (that is to say) *In case* there shall be one such Daughter and no more, then the Sum of 4000 *l.* shall be levied and raised for the Portion of such one Daughter; And in case there shall be two such Daughters, and no more, then the Sum of 5000 *l.* shall be levied and raised for the Portions of such two Daughters to be equally divided between them; And if there shall be three or more such Daughters, then the Sum of 6000 *l.* shall be levied or raised for the Portions of such three or more Daughters, to be equally divided amongst all such Daughters, Which said Portion or Portions shall be paid unto such Daughter or Daughters, who shall not be born, or shall be unmarried, or under the Age of 21 years at the time of the Commencement of the said Term of 99 years respectively, at the day or days of her or their respective Marriage or Marriages, or at her or their respective Age or Ages of 21 years, whichsoever shall first happen. BUT if she or they, or any of them, shall be married, or have attained the said Age of 21 years before the Commencement of the said Term of years, then the Portion or Portions of such Daughter or Daughters which shall be so married, or shall have attained her Age of 21 years before the Commencement of the said Term of 99 years shall be paid unto her or them respectively within one year after the Commencement of the said Term of 99 years.

The 99 years to raise Portions for Daughters.

To be paid at Marriage or 21 years.

If married or attain 21 before the commencement of the Term.

Then to be paid within one year, after commencement

AND nevertheless it is hereby also declared, meant, and agreed by and

Provision in case Daughters married in the Fathers life time.

between all the said parties to these presents, and the true intent and meaning of them, and every of them, and of these presents is, That in case any of the said Daughter or Daughters to whom any such Portion or Portions are so appointed to be paid, shall be preferred in Marriage in the life time of the said W.P. her Father, and that he the said W.P. shall have bestowed and given with such Daughter or Daughters in Marriage, as much Portion or more as is by these presents allotted unto her or them, That then such Daughter or Daughters shall not have any farther Portion raised for her, or paid unto her by virtue of these presents; *But* in case the said W.P. shall have given or bestowed with any such Daughter or Daughters in Marriage, any Portion or Portions less than the Portion or Portions hereby allotted unto her or them, That then such Portion or Portions so given in Marriage with such Daughter or Daughters by the said W.P. in his life time, shall be reckoned and accompted as part of the Portion or Portions hereby allotted and appointed to be paid to such Daughter or Daughters; *And* the said H.S. F.S. W.S. and G.G. and the Survivors and the Survivor of them, and the Executors or Administrators of the Survivor of them, shall by such means, and in such sort as aforesaid, levy and raise for such Daughter or Daughters so preferred in Marriage, and pay unto her or them only so much Mony, as together with the said Portion or Portions so paid by the said W.P. in his life time, shall make up the full Portion or Portions herein before allotted and appointed for such Daughter or Daughters, unless the said W.P. shall by any Writing under his Hand and Seal, subscribed and sealed by him in the presence of two or more credible Witnesses, or by his last Will and Testament in Writing, declare and appoint, That any such Daughter or Daughters so preferred in Marriage in his life time, shall have over and above the Portion by him given with her or them in Marriage, the whole Portion hereby allotted and appointed unto or for such Daughter, And then in Case of such Declaration or Appointment by the said W.P. such Daughter or Daughters so preferred in Marriage in the life time of the said W.P. shall have all such portion or portions as is hereby to or for his [?her] or them allotted or appointed, without deduction of any thing in respect of the portion or portions given by the said W.P. in his life time, Any thing herein contained to the contrary notwithstanding.

Maintenance for Daughters till Portions payable.

AND upon this farther Trust and Confidence, and to this farther intent and purpose, That he the said H.S. F.S. W.S. and G.G. and the Survivors and Survivor of them, and the Executors or Administrators of the Survivor of them, shall out of the Profits of the said Manors, Lands and Premisses, pay and allow unto all such Daughter or Daughters of the said W.P. begotten on the Body of the said S. which shall be living at the Commencement of the said Term of 99 years, and shall not be preferred in Marriage by the said W.P. in his life time, and to such Daughter or Daughters whereof the said S. shall be enseint and with Child by the said W.P. and shall be born after his Death, for her or their yearly Maintenance and Education from the time of the Commencement of the said Term and Estate for 99 years, until such time as her or their respective portion or portions before mentioned, shall become due and payable unto her or them respectively, during the times herein after mentioned, the yearly Sum or Sums following, (that is to say), unto such one Daughter (if there shall be but one such Daughter) until such one Daughter shall attain her Age of ten Years, the Sum of 50 *l. per Annum*, And after she shall have attained the said Age of ten Years, then the Sum of 100 *l.* yearly until her said portion shall become due and payable; And if there shall be two such Daughters, and no more, then unto each of the said two Daughters, until they shall respectively have attained their respective Ages of ten Years, the Sum of 33 *l.* 6*s.* 8*d.* apiece yearly, And after they, or

either of them, shall have attained their said Age of ten Years, then the Sum of 60 *l.* apiece yearly until their portions shall become due and payable unto them respectively, And in case there shall be more such Daughters than two, Then unto and amongst all such Daughters, until some or one of them shall have attained her, or their Age or Ages of ten Years, the Sum of one hundred pound yearly, to be equally divided amongst them, And after such time as they shall all of them have attained their several Ages of ten Years, then unto and amongst all such Daughters, the Sum of one hundred and fifty pound yearly to be equally divided amongst them, until their respective portions shall become due and payable unto them respectively.

AND that during all such time as some, or one of the said Daughters shall be under the said Age of ten Years, or some or one other of them shall be above the said Age of ten Years, such of the said Daughters as shall be under the said Age of ten Years, shall have for her Maintenance so much as she should have in case they were all under that Age ; And such of the said Daughters as shall be above the said Age of ten Years, shall have for her Maintenance so much as she should have in case they were all above that age : All the said Sums for Maintenance to be paid to the said Daughter or Daughters by quarterly payments yearly at the four most usual Feasts, or days of payment.

To surrender the Term after the Trusts performed.

AND UPON this farther Trust and Confidence also, That after all the said Portions and Sums of Mony shall be levied and raised, together with all Charges in or about the levying or raising thereof, Or that the said E.P. or any other to whom any Estate is herein before limited in remainder of the same Premisses, shall pay the same, That then at any time after, as also in case there shall be no such Daughter or Daughters at the time of the Commencement of the said Term, and after for 99 years ; Nor that the said S. shall then be enseint of any Daughter which shall be after born alive, they the said H.S. F.S. W.S. and G.G. their Executors, Administrators and Assigns, shall and will, at the reasonable request and proper costs and charges of such person or persons to whom the immediate Estate of Inheritance or Freehold of and in the Premisses, expectant upon the determination of the said Term of years, shall by the true intent and meaning of these Presents belong or appertain, surrender and yield up the said Estate and Term of years, unto such person and persons so requiring the same.

Grantor power to make Leases for 21 years at the best Rent.

PROVIDED always, and it is hereby declared, meant and agreed by and between all and every the said parties to these Presents, and the farther intent and meaning of them, and every of these Presents, is, That the said W.P. shall have full Power, Liberty and Authority, and that it shall and may be lawful to and for the said W.P. from time to time, during his natural life, by any Deed or Deeds, Writing or Writings, under his Hand and Seal, to be subscribed and sealed by him in the presence of two or more credible Witnesses, to demise, lease, limit and appoint the said Manors, Lands, Tenements, Rectories, Tithes, Hereditaments and Premisses, or any of them, or any part or parcel thereof, to any person or persons, for any Term or Terms of years not exceeding 21 years, to commence and take effect in Possession and not in Reversion, reserving thereupon the best yearly Rent that can reasonably be gotten for the same Premisses, or as much Rent as the same Premisses do now yield, or as hath been paid for the same by the greatest part of 20 years now last past, to continue payable during all such Term of years, and with and upon such Conditions, Covenants, and other Agreements as the said W.P. shall think fit, So as no such Lease or Estate be made dispunishable for Wast by any express Clause or Words therein to be contained.

PROVIDED likewise, and it is hereby farther declared, meant and agreed

The Brother in Remainder power to make a Joynture.

by and between all and every the said parties to these Presents, and the farther intent and meaning of them, all and every of them, and of these Presents is, That the said E.P. when he shall have any Estate in possession in the Premisses, or any part thereof, for his life, by virtue of the limitation to him herein before mentioned, And after that the said Estate or Term for 99 years herein before limited to the said H.S. F.S. W.S. and G.G. shall be ended and determined, shall have full Power, Liberty and Authority, and that it shall and may be lawful to and for the said E.P. then after from time to time, and at all times during his life, by any Deed or Deeds, Writing or Writings, under his Hand and Seal, to be by him subscribed and sealed in the presence of three or more credible Witnesses, to assign, limit or appoint to, or to the use of or in Trust for any Woman or Women, that shall be the Wife or Wives of the said E.P. for and during the Term of the natural life or lives of such Woman or Women, for or in lieu, name or stead of her or their Joynture, or part of Joynture, or better means of livelyhood, And that as well before as after the Marriage of the said E.P. with such Woman or Women whom he shall so Marry and take to Wife, any of the Manors, Lordships, Rectories, Messuages, Lands, Tenements, Hereditaments and Premisses herein before mentioned, to be granted or conveyed, or any part or parts, parcel or parcels of them, or any of them, to commence and take effect, as in such Deed or Deeds, Writing or Writings, shall be assigned, limited or appointed.

The said Brother power to make Leases.

PROVIDED ALSO, and it is hereby farther declared, meant and agreed by and between all and every the said parties to these Presents, and the farther intent and meaning of them, and every of them, and of these Presents, is, That the said E.P. when he shall have any Estate in possession in the Premisses, or any part thereof, for his life, by virtue of the Limitation to him herein before mentioned, And after that the said Estate or Term for Years herein before limited to the said H.S. F.S. W.S. and G.G. shall be ended and determined, shall have full Power, Liberty and Authority, and that it shall and may be lawful to and for the said E.P. then after from time to time, and at all times during his life, by any Deed or Deeds, Writing or Writings, under his Hand and Seal, to be subscribed and sealed by him in the presence of two or more credible Witnesses, To demise, lease, limit or appoint the said Manors, Lands, Tenements, Rectories, Tithes, Hereditaments and Premisses, or any of them, or any part or parcel thereof; to any person or persons, for any Term or Terms of Years, not exceeding 21 years, to commence and take effect in possession, and not in Reversion, reserving thereupon the best yearly Rent that can be reasonably gotten for the same Premisses, or as much rent as the same Premisses do now yield, or as hath been paid for the same by the greatest part of 20 years now last past, to continue payable during all such Term of years, so as such Lease or Leases be not made dispunishable for Wast by any express Clause or Words therein to be contained.

The execution of the powers herein contained shall no way bar the Annuity but Premisses shall still remain liable to the same during the Estates to be made by virtue of such Powers.

AND IT IS hereby also declared and agreed by and between all and every the said parties to these Presents, and the full intent and meaning of these Presents, and of all and every the said parties hereunto is, That the Execution of any the Powers here before contained, shall not in any wise bar or hinder the said S.S. or her Assigns, from having, taking and enjoying the said yearly Rent of four hundred Pounds, or Sums of Mony to be lost in name of a Pain for the Non-payment thereof, Or taking Distress for the same, but that all such Joyntures, Leases and Estates so to be made, assigned, limited or appointed by the said W.P. and E.P. respectively, or either of them, by virtue of any the Powers hereby given or limited unto them, or either of them, shall be, and are hereby agreed and declared to be subject unto the said yearly Rent of four hundred pounds, and Sums of Mony to be lost in

name of a Pain for Non-payment thereof, And that all the Manors, Messuages, Lands, Tenements, Hereditaments and Premisses, which shall be so assigned, leased, demised, limited or appointed by virtue of any the Powers, Liberties or Proviso's herein contained, shall notwithstanding any such Assignment, Lease, Limitation or Appointment, remain and be charged and chargeable with the said yearly Rent of four hundred pounds, and Sums of Mony to be forfeited and lost for Non-payment thereof, and liable to distress for the same, as they should or would have been in case no such Demise, Lease, Appointment, Assignment, Limitation or Estate so to be made, by virtue of any of the Powers aforesaid had not at all been.

And the Premisses shall endure during the Leases and Estates to be made according to the same chargeable as aforesaid.

AND that from and immediately after such Joyntures, Leases and Estates so made, assigned, limited or appointed by the said W.P. and E.P. respectively, or either of them, according to the Powers hereby given or limited unto them, and either of them, these Presents shall be and enure, and shall be adiudged, deemed and taken to be and enure of, for and concerning the Premisses so to be letten, estated, assigned, limited or appointed, And the said H.S. and F.S. and their Heirs, shall stand and be seized thereof, charged and chargeable as aforesaid, to the several and respective uses of the several and respective Persons, their Executors, Administrators and Assigns, to whom such Joyntures, Leases and Estates shall be so made, limited or appointed as aforesaid, for such Terms and Estates as shall be so leased, limited or appointed to them, according to the intent and true meaning of the said several and respective Deeds or Writings so leasing, limiting or appointing the same, And of the Reversion and Reversions thereof during the said Leases Terms and Estates, and of the Premisses themselves after the said Leases, Terms and Estates, shall be ended and determined, and as the same shall severally and respectively end and determine, To the several uses of such person and persons, and for such Estate and Estates, and with and under such Powers, Authorities and Provisoes, and in such sort, manner and form as the same are hereby declared, limited and appointed, and as the same should have been, if such Leases, Estates or Terms so to be made, by virtue of these Presents, had not at all been.

And afterwards to the uses of such Persons, and for such Estates as hereby declared as if no such Leases, &c. had been.

Covenant is Owner.

AND THE SAID W.P. for himself, his Heirs, Executors, Administrators and Assigns, and for every of them, doth covenant, promise and grant to and with the said H.S. and F.S. their Heirs, Executors and Administrators, by these Presents in manner and form following, (that is to say) That he the said W.P. at and immediately before the Sealing and Delivery of these Presents (for and notwithstanding any Act or Thing by him the said W.P. his late Father, deceased, or either of them done or suffered to the contrary) is the sole, true and lawful Owner and Proprietor of the said Manors, Lordships, Messuages, Lands, Tenements, Rectories, Tythes, Rents, Reversions, Hereditaments and Premisses whatsoever hereby granted or mentioned to be granted, and of every part and parcel thereof, with the Appurtenances, And solely, lawfully, rightfully and absolutely seized thereof, and of every part and parcel thereof, of a good, pure, absolute and indefezible Estate of Inheritance in Fee-simple, without any manner of Condition, Contingent, Proviso or Limitation of use or uses, or other Restraint, Matter or Thing, to determine, alter or change the same, And that he shall continue so seised thereof, and of every part and parcel thereof, until a good, perfect and absolute Estate in Fee-simple, shall be thereof vested in the said H.S. F.S. their Heirs and Assigns, to the uses, intents and purposes herein before mentioned, and according to the true intent and meaning of these Presents.

Seized in Fee.

Power to convey.

AND ALSO, That he the said W.P. (for and notwithstanding any Act or Thing heretofore done or suffered, as aforesaid) now hath good right, lawful and absolute Power and Authority in himself, to grant, alien, convey, settle

and assure the said Manors, Lordships, Messuages, Lands, Tenements, Rectories, Tithes, Rents, Reversions, Hereditaments and Premisses hereby granted, or mentioned to be granted, as aforesaid, and every part and parcel thereof, with the Appurtenances, unto the said H.S. and F.S. their Heirs and Assigns, to the uses before mentioned, and in manner and form aforesaid.

Free from Incumbrances.

AND ALSO, That the same Premisses, and every part and parcel thereof, with the Appurtenances, now are, and from henceforth for ever hereafter, shall remain, continue and be, to the uses, intents and purposes herein before mentioned, free and clear, and freely, clearly and absolutely acquitted, freed, exonerated and discharged of and from all, and all manner of former, and other Bargains, Sales, Gifts, Grants, Joyntures, Dowers, Entails, Estates, Leases, Rights, Titles, Rents, Arrearages of Rents, Issues, Fines, Amerciaments, Debts, Duties, Judgments, Statutes, Recognizances, and all Debts of Record, Extents, Seisures, Liberata's, Sequestrations, Forfeitures, Orders, Decrees, Titles, Charges, Troubles and Incumbrances whatsoever, had, made, committed, done, knowledged or suffered by the said W.P. party to these Presents, or by the said J.P. his late Father deceased, or by any other person or persons whomsoever, by or with their or either of their means, consent, act, privity, knowledge or procurement.

Except former Annuity.

SAVING AND EXCEPT one Annual Rent of 200 *l. per Annum*, in and by one Indenture Tripartite, dated the, &c. in the 16th Year of the Reign of, &c. made, or mentioned to be made between W.P. Grandfather of the said W.P. party to these Presents, of the first part, the said J.P. and S. his Wife, Father and Mother of the said W.P. (party to these Presents) of the second part, and T.L. and T.J. Gent. of the third part, limited out of part of the Premisses to the said J.P. and S. during their Joynt lives, and the life of the longer liver of them. *Which* Rent of 200 *l. per Annum*, it is hereby declared and agreed by and betwixt all the said parties to these Presents, shall continue and remain during the life of the said S. according to the true intent and meaning of the said Indenture. And that all future Assurances of the Lands and Premisses, by the said Tripartite Indenture, mentioned to be charged with the said Rent shall be, and shall be construed and taken to be, To the intent to make good the said yearly Rent during the life of the said S. And saving and except one Lease by Indenture, dated the, &c. made between the said W.P. and J.P. of the one part, and H.A. Gent. of the other part, of the Rectory and Parsonage Impropriate of P. and other Hereditaments therein mentioned, for the Term of 79 years therein mentioned, if the said W.P. shall so long live.

Farther Assurance.

AND THE SAID W.P. for himself, his Heirs, Executors, Administrators and Assigns, and for every of them, doth covenant, promise and grant to and with the said H.S. and F.S. their Heirs, Executors and Administrators, and every of them by these Presents, That he the said W.P. and all and every other person and persons whatsoever, having or lawfully claiming, or which shall or may at any time or times hereafter, have or lawfully claim any Estate, Right, Title or Interest, of, in or to the Premisses, hereby granted, or mentioned to be granted, or of, in or to any part or parcel thereof, by, from or under the said W.P. party to these Presents, or the said J.P. his late Father deceased, or either of them (other than the said S.P. and the Persons and Lessees and their Assignees, whose Estates and Interests are before in these Presents excepted, for and in respect only of the same Estates and Interests so excepted) shall and will from time to time, and at all and every time and times hereafter, within the space of seven years next ensuing the date of this present Indenture, at and upon the reasonable request of the said H.S. and F.S. their Heirs, Executors or Administrators, but at the proper charges of the said W.P. his Heirs, Executors or Administrators, Do, make, levy, execute,

acknowledge and suffer, and cause to be done, made, levied, executed, acknowledged and suffered, all and every such farther and other reasonable Act and Acts, Thing and Things, Devise and Devises, Assurance, Conveyance and Conveyances in the Law whatsoever, for the farther, better and more perfect assurance, surety, sure-making, settling, establishing and confirmation of all the said Manors, Lordships, Rectories, Advowsons, Messuages, Lands, Tenements, Rents, Reversions, Hereditaments and Premisses, whatsoever, hereby granted or mentioned to be granted, or any of them, and of every or any part or parcel thereof, with all and singular their and every of their Appurtenances, unto the said H.S. and F.S. their Heirs and Assigns, unto and for such and the same uses, intents and purposes, and with and under such and the same Powers, Liberties and Proviso's, as the same Premisses are in, and by these Presents, granted, conveyed, limited and setled, or mentioned to be granted, conveyed, limited or setled; Be it by Fine or Fines, Feoffment or Feoffments, Deed or Deeds, Indented or Poll, Inrolled or not Inrolled, Common Recovery or Recoveries, with single, double or treble Voucher or Vouchers, Release or Confirmation with Warranty, or by all and every, or any of the said ways or means, or by any other ways or means in the Law whatsoever; as by the said H.S. and F.S. their Heirs, Executors or Administrators, or their or any of their Counsel Learned in the Law, shall be reasonably devised or advised; so as the same extend to no farther or other Warranty or Covenants than against the parties to such Assurances respectively, and for their own Acts only.

So as the Warranty and Covenants be against the parties and their own Acts only.

AND LASTLY, It is hereby covenanted, granted, concluded and agreed, by and between the said parties to these Presents, for them and their Heirs; And they do hereby publish and declare, That all and singular Fine, and Fines, Common Recovery and Recoveries, and all farther and other Assurances and Conveyances whatsoever, of the said Premisses hereby granted, or mentioned to be granted, and every, or any part or parcel thereof, at any time after the day of the date hereof, had, made, levied, executed or acknowledged between the said parties to these Presents, or any of them, or whereunto they or any of them shall be party or parties, shall be and enure, and shall be construed, expounded, adjudged, deemed and taken to be and enure. And that all and every person and persons which now stand and be seised, or which shall at any time or times hereafter, stand and be seised of the Premisses hereby granted or mentioned to be granted, or of any part or parcel thereof, shall from time to time, and at all times hereafter stand and be seised thereof, and of every part and parcel thereof, to the same uses, intents and purposes, and with and under the same Powers, Liberties and Proviso's, as the same Premisses are in and by these Presents limited and setled, or mentioned to be limited or setled. IN WITNESS, &c.

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